ESSAYS

UPON

I. The Law of Evidence.

II. New Trials.

III. Special Verdicts.

IV. Trials at Bar.

AND

V. Repleaders.

IN THREE VOLUMES.

By JOHN MORGAN,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. I.

CONTAINING The Law of Evidence.

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MDCCLXXXIX.

PREFACE.

THE following Effays, efpecially the two firft, may be confidered as nearly related to each other. In many of the cafes given upon the fubject of *New Trials*, one, at leaft, of the grounds whereon the court hath been moved to refcind a verdict, refpects the *Law of Evidence*; *i. e.* that a verdict was againft evidence; that improper evidence was admitted; or, that proper evidence was rejected.

It is prefumed that thefe Effays will be of great ufe, not only to the *learned advocate*, (much engaged in bufinefs,) and to the *ftudent of the law*; but that the two firft, at leaft, will be very ufeful to every *acting magiftrate*, who wifhes to difcharge his duty confcientioufly; and which he cannot do,

venience, than to risque the rendering the work more imperfect than it is, in its present state: of this, however, more hereafter.

As to the two *first* Essays, so much is said in the respective introductions, that only a few occasional observations will be necessary in this preface: yet some things should be noticed here, respecting the performance in general, which could not, with propriety, be made part of an introductory discourse. It may, without vanity, be said, that the work contains a great fund of learning, upon many important points; not the learning of the compiler, but of the ablest advocates, and the wisest sages of the law.

Upon perusal of the four last Essays, but particularly the second, it is hoped the curious reader will receive some pleasure, from observing our gradual improvement in jurisprudence, especially of late years; and which will be easily seen, as the cases under the respective heads are, in general, arranged in chronological order. The same method is commonly observed in the subsequent Essays.

In

In the ſecond, third, fourth, and fifth Eſſays, the language of the reporters hath been uſually preſerved, for obvious reaſons; and for which, therefore, the author truſts he ſhall not be reſponſible. Sometimes, however, he hath taken the liberty to attempt an amendment, where he was ſure it could be ſafely done, without altering the ſenſe.

It is otherwiſe with reſpect to the *firſt* Eſſay. Every thing that was thought requiſite, hath been taken from *Gilbert's Law of Evidence*, for the work hath long been the property of the public.

His reaſoning hath very frequently been preſerved; for *reaſons* make much ſtronger impreſſions on the mind, than dry rules of law: but the author of this work, (convinced that the learned judge had never put the finiſhing hand to that treatiſe, and finding it abſolutely neceſſary,) hath frequently preſumed to vary the language.

Some may ſuppoſe *Gilbert* hath been merely copied: nothing is wiſhed for more, than

a cloſe inſpection, and compariſon of the two works. The *arrangement* of *his* matter, differs very eſſentially in many particulars, which will appear by attending to the references: Add to this, that the firſt Eſſay contains many determinations, made ſubſequent to the laſt edition of *Gilbert*; and nearly double the quantity of matter.

Gilbert frequently cites *Trials per Pais*: it is the ſixth edition. The author of this work was ſeveral times inclined to compare the citations with the laſt edition, and alter the pages; but upon mature deliberation, conceiving the authority of *Gilbert*, to be, at leaſt, equal to that of *Trials per Pais* *, and that perhaps few, if any, would refer to the work; he thought it unneceſſary, and hopes he ſhall not be reſponſible for the correctneſs of thoſe references: as to others, where he doubted, he conſulted the original authorities.

* It is not mea[illegible]hrow any imputation upon that work; it contains much lea[illegible], and a great deal of new, and uſeful matter is added to the laſt edition.

All

All the references and citations of *Gilbert* are preferved: the fame may be faid with refpect to *Buller's Nifi Prius*, from which many extracts have been taken, and references generally given to that work.

In tranflating the *French* cafes, great care hath been taken; but perhaps there may be fome errors. Upon looking into thofe reporters, one might be induced to think that the authors of many of them, did not underftand the language in which they wrote; or, that they left the correction of the prefs to perfons ignorant of the *Norman* tongue.

As this work is, avowedly, a compilation, the charge of plagiarifm cannot be made. Where there is any thing like original compofition, and fome there may be, if *ideas* have been taken from others, references will generally be found in the margin, unlefs the authors are mentioned in the body of the work.

The difficulty of throwing the *firft* Effay into a proper form, (fuch as might be agreeable to every one,) and of claffing and

arranging the *others*, can be known to thoſe, only, who make the experiment.

A theory in the *analytic* form, (if the author's memory fail him not,) was long ſince publiſhed on the ſubject of the *firſt* Eſſay; but the particulars of its arrangement, he hath totally forgotten, not having ſeen it for many years.

With reſpect to the Eſſay on *New-trials*, it is the *firſt* upon the ſubject: This being a *new* attempt, the author hopes it will be favourably received, and its imperfections excuſed.

If any one ſuppoſes he could have given a more perfect work to the public, he may, very probably, be right. Whoever will make the attempt, and perſevere, (laying aſide this work,) will eaſily judge of the infinite difficulties, with which the author hath had to ſtruggle.

A ſevere critic may ſay, that abſtracts of ſeveral caſes are given, not immediately relative to the ſubject under conſideration; and that various parts of others might have been omitted, as irrelevant; but, perhaps, they con-

tain

tain ſome general doctrines of great importance, and neceſſary to be more univerſally known, than perhaps they are at preſent. Granting, however, that the work may in ſome inſtances appear too prolix, as in others it may be too conciſe, the author can truly ſay, that he hath *endeavored* to render it as perfect as he could, and uſeful to every reader.

A great number of references, made by authors from whom this work is compiled, have been examined; ſome have been added, and many made, from one part of the work to another. When a reference is merely *ante* or *poſt*; *ſupra* or *infra*, it is, generally, to the ſame head; the former uſually ſignifying at a greater diſtance from the reference, than the latter.

A copious *Analyſis* of the *Law of Evidence*; a plan or contents of the *ſecond* Eſſay, reſpecting *New-trials*; *Tables* of the names of th[illegible] the whole work; and an *Index* to th[illegible] matters contained in the two [illegible] annexed.

In the tables, the cases may be found either under the name of the *plaintiff*, of the *defendant*, or of the *lessor* of a *plaintiff* in ejectment.

In the *second* Essay, the principal points of each case are put in the margin: in the *third*, *fourth*, and *fifth* Essays, they are put at the top of each case. If the author's friends will hint to him which method is preferable, it may be adopted in a second edition. As to the *first* Essay, the *arrangement* and *analysis* render such marginal notes, *&c.* unnecessary.

Many points in the *Law of Evidence* might have been enlarged upon; *ex. gr.* where some of the general rules of evidence are given, as under the head of *witnesses in criminal cases*, *&c.* but books are referred to for further information, where necessary, which, perhaps, will seldom be the case.

Under *not guilty* in *criminal cases*, there are probably some repetitions; but the rules are collected together in one view, and some repetitions might be necessary there, (and perhaps

haps elſewhere,) to illuſtrate the rules and doctrines under conſideration, without the trouble of referring to other parts of the work. There may be ſeveral omiſſions; but, probably, the matter will be found under other heads, where it is more relevant, or the deficiency ſupplied by references.

A few caſes and references *pro et con.* are given: they not only ſhew the progreſſive improvements in our juriſprudence, but may, occaſionally, be uſeful.

In the *ſecond* Eſſay, and ſometimes in the ſubſequent ones, repetitions, unavoidably, happen; or otherwiſe the caſes would appear in a very mutilated ſtate, and the reader muſt have had much trouble, in referring to other parts of the book.

The many interruptions the author hath met with, in the courſe of his work, will, he truſts, afford him an apology for any trifling miſtakes, &c. He hath frequently reviſed it, as opportunity would permit, and uſed his utmoſt endeavors to render it correct.

Since the commencement of the work, ſeveral caſes relative to the ſubjects of which he treats, have been determined; every one of which, (that hath come to his knowledge,) hath been either given at length, or abſtracted.

Where caſes are doubtful, *quæries* are affixed: they may attract more particular attention.

The great variety of caſes, and the multiplicity of abſtracts here collected together, muſt, it is conceived, be of general uſe. It may, with truth, be affirmed, that infinite pains have been taken to avoid leading the reader into any miſtake; and, in every part, to furniſh him with the means of making himſelf maſter of the ſubject under conſideration.

No one can form an idea of the care, labor, and attention beſtowed on this work, without inſpecting the original manuſcript; the collections made for it; and the plans whereon it is formed. However, (after all) the author hath ſome doubts, particularly with reſpect to that part of the *firſt* Eſſay, which relates to proceedings in *equity*, *(int. al.)* Having

usually practised in courts of law, he is not perfectly satisfied as to its correctness; and fears he may be sometimes mistaken: nevertheless, he hopes the reader will be indulgent, as the best authorities have been consulted; although the author is conscious that *reading* without *practice*, will not properly qualify a man to write for the instruction, or assistance of others. But as it would have been improper to have passed by proceedings in *equity* unnoticed, he hath given what he thought essentially necessary, and that in the best manner he could.

In the four last Essays, but especially in the *second*, the reader will observe that, in almost every case, the counsel and court refer to a variety of other cases: most of them are contained in this work: references are generally made to those cases in the margin: if there are any omissions in this respect, the tables will (it is hoped) supply the defect.

It is presumed that the utility of this compilation will evidently appear, because the principal cases being collected together, may

be referred to immediately, with little trouble.

In the *second* Eſſay, under diviſion IX. two or three heads of the ſubdiviſions are very ſhort, but the matter could not be properly arranged under any of the other ſubdiviſions.

The nature of the three laſt Eſſays, is ſufficiently announced by their titles. They bear an intimate relation to the ſubjects of the preceding ones: the author thought they would render the work more complete. His principal object hath been to make it uſeful to the public, and worthy of acceptance. Having done every thing in his power to obtain that end, he hopes he ſhall not be wholly diſappointed in his expectation of receiving ſome degree of approbation.

EXPLA-

EXPLANATIONS.

A.

Acc. or *Ag.* or *Agr.*	Accord or Agreed.
Adj.	Adjudged: ſometimes, adjourned.
Adm.	Admitted.
Aſſ.	Liber Aſſiſarum. The reference by Placita.
Ann.	Annaly; or Caſes in the King's Bench, in the time of Lord Hardwicke.
Ante & poſt.	Where theſe References ſtand alone, they are generally to the ſame Diviſion, or Subdiviſion.

B.

B. or C. B.	Common Bench, or Common Pleas.
B. M.	Burrow's Reports, in the time of Lord Mansfield.
B. N. P.	Buller's Law of Niſi Prius.
B. R.	King's Bench.
B. R. H.	Annaly, or Caſes in the King's Bench, in the time of Lord Hardwicke.
B. S. C.	Burrow's Settlement Caſes.
Bend.	Bendloe's Reports.
Bl. Com.	Blackſtone's Commentaries.

Bo. R. Act.	Booth of Real Actions.
Bro.	Brooke's Abridgment.
Brownl.	Brownlow's Reports.
Bunb.	Bunbury's Reports.
Burr.	Burrow's Reports.

C.

C. B.	Common Bench.
C. P.	Common Pleas.
C. T. T.	Cases in the time of Lord Talbot.
Ca. Ch.	Cases in Chancery.
3d Ca. Ch.	3d Vol. of Cases in Chancery; or, Select Cases in Chancery.
1, 2, & 3 *Ch. R.*	Reports of Cases in Chancery, temp. Cha. I. &c. examined with 3d Ed. Fo. 1736, by the pages of the 8vo Edition, which are there preserved in the margin. Note, 1 *Ch. R.* contains the *argument on the jurisdiction of the chancery*, which is described by *Arg.* 1 *Ch. R.*
Ca. P. or *Ca. Parl.*	Cases in Parliament.
Cart.	Carter's Reports.
Carth.	Carthew's Reports.
Ch. R.	Chancery Reports, tempore Finch.
Co. Lit.	Coke upon Littleton.
Com. Dig.	Comyns's Digest.
Cont.	Contra.
Cowp.	Cowper's Reports.

D.

D.	Dictum. Sometimes a letter of reference to a book.
D. & St.	Doctor and Student.
D. of Norf.	Duke of Norfolk's Case in 3d Cases in Chancery; or, Select Cases in Chancery; or, 3d Ch. R.
Dal.	Dallison's Reports.
Dan.	Danvers's Abridgment.
Doug.	Douglas's Reports.
Dub.	Dubitatur.
Dugd. Or. J. or *Jud.*	Dugdale's Origines Juridiciales.
Durn. & East.	Term Reports, by Messrs. Durnford & East.
Dy.	Dyer's Reports.

E.

Eq. Ca. or *Eq. R.*	Gilbert's Reports of Cases in Equity. 2d Edition.
Eq. Ca.	Sometimes Gilbert's, as above. Sometimes the 2d, or equity part of 2 *Mod. Ca.* (Modern Cases in law and equity;) but when the latter is meant, it is marked.
Eq. Ab. or *Eq. Abr.* or *Eq. Ca. Ab.*	Equity Cases Abridged.

F.

F. N. B.	Fitz-herbert's Natura Brevium. The pages accórding to the old Edition. Theſe pages are marked in the margin of Hale's 4to Edition.
Fg. or *Fitzg.*	Fitz-gibbons's Reports.
Finch Ch. R.	Chancery Reports tempore Finch.
Fitz. or *Fitz. Ab.*	Fitz-herbert's Abridgment.
Fl.	Fleta.
Fort.	Forteſcue de laudibus legum Angliæ.
Fort. Rep.	Forteſcue's Reports.

G.

G. L. E.	Gilbert's Law of Evidence. Edit. 1756.
Godb.	Godbolt's Reports.
Gol. or *Gold.*	Gouldſborough's Reports.

H.

H. H. P. C.	Hale's Hiſtory of the Pleas of the Crown. 8vo.
H. P. C.	Hawkins's Pleas of the Crown. The folio Edit.
Hawk. (L.)	Leach's Hawkins's Pleas of the Crown.
Hard.	Hardres.

J.

Jenk.	Jenkins's Centuries.
Jon. or 1 *Jon.*	Sir William Jones's Reports.

2 *Jon.*

2 *Jon.*	Sir Thomas Jones's Reports.
Infra & *Supra.*	References to the same Division, or Subdivision.

K.

Kel.	Keilway's Reports.
Kelg.	Kelynge's Reports.
Kit.	Kitchen of Courts. French Edit. 1623.
L. E.	The first Essay, on the Law of Evidenc
L. Hawk.	Leach's Hawkins's Pleas of the Crown.
Lamb.	Lambard's Justice.
Lut. or *Lutw.*	Lutwyche's Reports.
Lit.	Littleton's Reports.
Lit. with *S.*	Littleton's Tenures, *S.* for Section.

M.

Ms. Vad. Mec.	Morgan's Vade Mecum, and Client's Instructor.
Ma.	Malyne's Lex Mercatoria. Folio Edit. 1686.
Mar.	March's Reports. When the reference is marked *pl.* it is to the placitum; without that, to the page.
Mar'.	Advice concerning Bills of Exchange, by Marius. Folio Edit. 1684.
Merton (*Stat.*)	Statute of Merton. 20 *H.* 3.
Mo.	Moore's Reports.

Mod. Ca.	6th Modern Reports.
2 *Mod. Ca.*	Modern Cases in Law and Equity, 1st Part; or, 8th Modern.
7 *Mod.*	7th Modern Reports; or, Farresly.
Moll. de Jur. M.	Molloy de Jure Maritimo, 3d Edit. 1682, or, 5th Edit. 1701.

N.

N. T.	The second Essay, on New Trials.
New Ab.	The New Abridgment, commonly called Bacon's.

P.

P. W. or *P. Wms.*	Peere Williams's Reports.
Park.	Park's Law of Marine Insurances.
Perk.	Perkins's Profitable Book, treating of the Law of England.
Pl. or *Pl. Com.*	Plowden's Commentaries.
Post vel ante.	Reference, generally, to the same Division, or Subdivision.
Pr. Ch.	Precedents in Chancery.
Pr. R. or *Pr. Reg.* or *Sti. Pr. Reg.*	Style's Practical Register, 2d Edit.

R.

R.	Resolved.
Reg.	Registrum Brevium.
Reg. Jud.	Registrum Judiciale.
Reg. Or.	Registrum Brevium Originalium.
Reg. Pl.	Regula Placitandi.
Rol. with *l.* or a letter, as *A.*	Roll's Abridgment; *l.* for line, Letter for Division.
Rol. without *l.* or Letter.	Roll's Reports.

S.

S.

Sal. or *Salk.*	Salkeld's Reports.
Sand. or *Saund.*	Saunders's Reports.
Semb.	Semble. Seems.
Sho.	Shower's Reports.
Som.	Somner of Gavelkind.
Ld. Som. Argt.	Lord Somers's Argument in the Banker's Caſe.
St. Tr. or 1 *T.* &c.	State Trials compared with 2d Edit. 1730.
St. P. C. or *Stamf. P. C.*	Standford's Pleas of the Crown.
Stat. Merton.	Statute of Merton. 20 *H.* 3.
Sti. or *Sty.*	Styles's Reports.
Sti. Pr. Reg.	Styles's Practical Regiſter, 2d Ed.
Stra.	Strange's Reports.
Supra vel infra.	Reference to the ſame Diviſion, or Subdiviſion.

T.

Th. D. or *Th. Dig.*	Theoball's Digeſt.
Tr. Eq.	Treatiſe of Equity.
Tri. per Pais.	Trials per Pais. 6th Edit.
Tr. (*St.*) or 1 *Tr.* &c.	State Trials, compared with the 2d Edit. 1730.

W.

W. 1.—*W.* 2.—*W.* 3.	The Statutes of Weſtminſter, 1ſt, 2d, and 3d.—1ſt, 3 Ed. 1.—2d, 13 Ed. 1. St. 1.—3d, 18 Ed. 1. St. 1.
Went. Off. Exr.	Wentworth's Office of an Executor. Edit. 1689.

West

West Symb.	West's Symboleography.
Winch.	Winch's Reports.

Y.

Y.B. or *Year Books.*	Year Books, compared with the Edit. of 1679, 1680.

Note. Some Cases being referred to by the pages as quoted in Theoball's digest, which do not correspond with that edition, wherever the page is twice mentioned, that within a crotchet, thus [ ] is of the edition of 1679, 1680.

When the page of a book is included in a parenthesis, thus, (466,) the page is twice numbered in the book cited.

Quotations, not specified above, are such as are conceived to be obvious, and therefore omitted.

ANALYSIS

ANALYSIS

OF THE

LAW of EVIDENCE.

(II.) Wri-

[3.] Of

I. WRITINGS under SEAL.
II. WRITINGS without SEAL.
I. WRITINGS under SEAL, they are

Charters,
Deeds between Party and Party,
Deeds Poll,
Obligations, and Bills Penal.

(a.) Of

[1.] *Of*

TABLE

OF THE

NAMES of the CASES in ESSAY I.

Upon the Law of Evidence.

 Beaufort

C.

Fanshaw

Henwell

Newman

T.

V.

U.

W.

Wheeler

ERRATA.—VOL. I.

The Title *Introduction* ſhould not have been printed beyond page 50.

Page 71 marg. for *M.* read *Mo.*
236 marg. read *Swift* and *Butcher*. *Clerk* and *Martin*.
354 marg. for *Vel*, read *Tel.*
359 marg. for *Co. Lit.* 15. 6. read *Co. Lit.* 15. *b.*
378 The 4th line appears as an *head*, and the next begins with *capitals*, whereas the 5th is merely a continuance of the 4th line.
381 marg. for 14 *B.* read *K. B.*

VOL. II.

Page 110, line 2, for *Necord*, read *Record.*

VOL. III.

Page 83 marg. for *Pewice*, read *Pierce.*
286 marg. for *Lemartre*, read *Lemaitre.*
Id. —— for *Bravet*, read *Brand.*

*** If any typographical errors are unnoticed, it is hoped the candid reader will correct them.

Should any caſe be, by miſtake, put under an improper head, it is hoped the Index will ſerve to correct ſuch miſtake.

ESSAY

TO THE

RIGHT HONORABLE

LLOYD Lord KENYON,

BARON OF GREDINGTON,

IN THE COUNTY OF FLINT,

LORD CHIEF JUSTICE OF ENGLAND,
&c. &c. &c.

MY LORD,

YOUR Lordſhip preſiding in a Court where the ſubjects of the following Eſſays come more frequently under diſcuſſion, than in any other; it naturally occurred to me, that you was the moſt proper perſon, to whom I could dedicate my work: I therefore took the liberty of deſiring permiſſion to addreſs them to your Lordſhip, and am happy to ſay, that you complied with my requeſt in the moſt polite and obliging manner.

Although I indulge myſelf in an hope that theſe Eſſays will be of ſome uſe to the profeſſion, as they are the reſult of conſiderable labor and attention; yet, in preſuming to offer them

them to your Lordſhip's patronage, I do it with the utmoſt diffidence; convinced that ſhould you favor them with your approbation, it will be owing, not ſo much to their own merit, as to a continuation of your Lordſhip's indulgence.

Flattery is ſo much the language of dedications, that truth itſelf is frequently conſidered as adulation. I might, however, without the fear of ſuch an imputation, expatiate upon your Lordſhip's extenſive knowledge of the Law of England, by which your determinations are uniformly governed; but in this I have been anticipated by every one who knows the importance of deciſions, which ſtand upon ſuch a ſolid foundation.

That your Lordſhip may long continue in that high office, to which your merit hath raiſed you, is the fervent wiſh of

My Lord,
Your Lordſhip's
moſt obedient,
and obliged humble Servant,
JOHN MORGAN.

Inner Temple,
15th Dec. 1788.



ESSAY I.

Upon the Law of Evidence.

INTRODUCTION.

(a.) *Of Evidence in general.*

THE *law of evidence* is of the utmost importance to every member of the British state. It may be said, with great propriety, that the liberty, the life, and the property of every individual depend upon this law. The *English* have been more *astute*, more elaborate, more scrupulously exact with respect to the rules of evidence, than any other people: we may attribute this to the excellence of their laws, and the freedom of their constitution.

In endeavouring to treat the subject methodically, it hath of necessity branched into many divisions, and subdivisions, as will appear upon inspection of the *Analysis* annexed.

The law of evidence hath been treated of by several learned lawyers. One is supposed to have written a treatise professedly upon the subject, but it is said that he did not complete the work, though it appears under his name; and those who have read it, will, perhaps, readily believe the assertion. Another hath taken it up, in a very useful work, as one, among many other heads; but appa-

rently without any design to give a *complete* treatise.

A publication, intituled *Trial per Pais*, preceded both those works, and to which they are much indebted: others have cursorily treated of the law in question. However, upon a supposition that something *more comprehensive* at least, if not *more methodical*, was wanting upon a subject of so much importance, the following *Essay* is offered to the public. The author does not presume to say, it is a complete and perfect work: — No: it is merely an *Essay*, aiming at improvement. The principal object the author had in view was, to digest and arrange the rules and law of evidence in the best manner he could; and by prefixing the authorities, to enable the reader to find with ease, either in this work, or in other books, what he may want. Further he hath not presumed. — If he hath thrown any new light upon the subject, if his work shall contribute to lessen the labor of the Student, and accelerate the researches of the learned Advocate, his principal end will be obtained: should he meet with their approbation, it will gratify his highest ambition.

It may not be improper farther to observe, that Lawyers are not the only persons who have made observations upon human testimony; upon that which must ever be fallible. The subject hath not escaped the notice of Mr. *Locke*, Mr. *Paley*, and others. The observations of Mr. *Locke* are to the following purport: *viz.* that there are several degrees from perfect *certainty* and *demonstration*, down to *improbability* and *unlikeness*, even to the confines of *impossibility*; that there are several acts of the mind proportioned to these degrees

of evidence, which may be called the degrees of *aſſent*, from full *aſſurance* and *confidence*, to *conjecture*, *doubt*, and *diſbelief*.

If Mr. *Locke*'s obſervations are duly conſidered, and attention is paid to the *Analyſis* annexed, it will clearly appear that the ſubject in queſtion is very extenſive, and muſt be extremely intricate in its diſcuſſion.

Human teſtimony, *i. e.* evidence given by one man to another, can never produce *certainty*, which is a *clear* and *diſtinct* perception, depending upon a man's own ſenſes, *i. e* that which is called *ſelf-evidence*, or *intuitive knowledge*.

In the trial of cauſes, therefore, thoſe to whom evidence is given, and who are to determine upon that evidence, muſt judge upon *probability*; *viz.* the higheſt degree of probability muſt govern their judgment; and it neceſſarily follows, that they ought to have before them *the beſt evidence of which the nature of the caſe will admit*: leſs is productive of *opinion* and *ſurmiſe* only, and does not give the mind entire ſatisfaction; for if, from the nature of the tranſaction, it appears that there is further evidence, which hath not been produced, the non-production of it affords a preſumption that it would have contradicted ſomething which hath already appeared, and perhaps have varied the caſe eſſentially; therefore, the mind doth not acquieſce in leſs than the utmoſt evidence whereof the fact is capable.

The preceding RULE muſt, conſequently, be conſidered as *fundamental* in the law of evidence.

It is not the author's intention, if he had ability, to enter into a *metaphyſical* diſquiſition: he will only obſerve that *demonſtration*

is converſant about permanent things, ſuch as are conſtantly evident to our ſenſes, and which afford a *clear* and *diſtinct* compariſon; whereas tranſient things cannot always occur to our ſenſes; they are, in general, more obſcure than the others; for they have not any conſtant exiſtence, and muſt be retrieved or recalled by memory.

The affairs and tranſactions of civil life, depend upon the actions of men; they are tranſient, and oftentimes, if not always, incapable of *demonſtration*; therefore upon trials reſpecting the rights and the crimes of men, the queſtion in iſſue muſt be determined upon *probability*.

Demonſtration is founded upon the view of a man's own proper ſenſes, by a gradation of clear and diſtinct perceptions: *probability* is founded upon obſcure and indiſtinct views, or upon report of the ſight or knowledge of others.

When we are to judge of a thing of which we ourſelves have not any ſelf-evidence, or intuitive knowledge, it muſt unavoidably be by extrinſic evidence, ſuch as report from others, &c. this does not amount to *demonſtration*; therefore, in queſtions concerning the tranſactions of men, not within our own knowledge, and of which we are to form a judgment from extrinſic evidence, we muſt give faith and credit to human records; or the honeſty and integrity of credible and diſintereſted witneſſes; atteſting a fact under the ſolemnity and obligation of religion, as well as the dangers and penalties of perjury; in which caſe the mind muſt acquieſce therein as from a knowledge by demonſtration, becauſe, according to the nature of things, it ought

ought not any longer to doubt, but to be nearly, if not as perfectly well satisfied, as if we of ourselves knew the fact.

According to Mr. J. *Blackstone*, *L.* III. *c.* 23. *evidence* signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other, and no evidence ought to be admitted to any other point.

Evidence upon trials by jury is of *two* kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge *; the former or *proofs* (to which in common speech the name of *proofs* is usually confined) are specified hereafter.

* Vide infra *(i)*.

In this essay we shall treat of the subject at large, under the following heads, *viz.*

[A.] OF WRITTEN EVIDENCE.

[B.] OF PAROL EVIDENCE.

[C.] OF EVIDENCE UPON VARIOUS ISSUES.

[D.] OF DEMURRERS TO EVIDENCE, AND OTHER DEMURRERS, *&c.* AT NISI PRIUS.

[E.] OF BILLS OF EXCEPTIONS.

[A.] WRITTEN PROOFS, or EVIDENCE, are

I. PUBLIC.

II. PRIVATE.

I. PUBLIC, are

(I.) RECORDS.

 (II) WRITINGS

(II.) WRITINGS not OF RECORD.

II. PRIVATE, are

(I.) WRITINGS under SEAL.

(II.) WRITINGS without SEAL.

Such writings are *Charters*, *ancient deeds* of 30 years, which prove themselves *, *modern deeds*, and other writings, both of which must be attested and verified by *parol evidence* of *witnesses*: as to the particulars, *vide infra*.

* Blackst. Com. l. iii. c. 23. Vide infra.

(*b.*) *General Observations.*

There is one general rule that runs through all the doctrine of trials, *viz.* (as before observed) that the best evidence of which the nature of the case will admit, shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed: the reasons have been already assigned; examples will be hereafter given.

It may not be improper here to observe, that, in general, no evidence of a discourse with another can be admitted, but the party himself must be produced; yet in some cases (as in proof of *general customs*, or matters of *common tradition* or *repute*,) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared when living; but such evidence will not be received of any *particular facts*. Upon this subject of *hearsay* evidence, the reader may not perhaps be dissatisfied with the observations of a very able writer; he says, "a "person who relates an *hearsay* is not obliged "to enter into any particulars, to answer any "questions,

" questions, to solve any difficulties, to re-
" concile any contradictions, to explain any
" obscurities, to remove any ambiguities: he
" intrenches himself in the simple assertion,
" that he was told so, and leaves the burthen
" entirely on his dead or absent author."—
But to proceed to *parol* evidence.

[B.] PAROL EVIDENCE or WITNESSES, they are

I. COMPETENT.

II. Not COMPETENT.

I. COMPETENT are

[1.] *Credible.*

[2.] *Of doubtful credit.*

II. Not COMPETENT are

[1.] *Infamous.*

[2.] *Interested.*

[3.] *Wanting discernment.*

[4.] *Counsel, Attornies,* and *Solicitors,* who are intrusted by their clients.

Concerning these we shall treat in their places.

(*c.*) Of process *to compel witnesses to attend.*

As to *witnesses,* there is a process to compel them to appear and give testimony, called a *subpœna ad testificandum,* which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of 100 *l.* to be forfeited to the king, to which the statute 5 *El. c.* 9. hath added a penalty of 10 *l.* to the party aggrieved, and damages equivalent to the loss sustained by the want

of the defaulter's evidence. But a witneſs, unleſs his reaſonable expences are tendered unto him, is not bound to appear; nor, if he appears, is he bound to give evidence until ſuch charges are actually paid him; except he reſides within the bills of mortality, and is called upon to give evidence within the ſame.

This compulſory proceſs, to bring in unwilling witneſſes, and the additional terrors of an attachment, in caſe of diſobedience, are of excellent uſe in the inveſtigation of truth; and, upon the ſame principle, in the *Athenian* courts, the witneſſes who were ſummoned to attend the trial, had their choice of three things; either to ſwear to the truth of the fact in queſtion, to deny or abjure it, or elſe to pay a fine of a thouſand drachmas *.

* Pott. Antiq. b. 1. c. 21.

(*d.*) *What* witneſſes *are to be received.*

All witneſſes of whatever religion §, or country, who have the uſe of their reaſon, are to be received and examined, except ſuch as are before ſtated to be *incompetent* †. All others are *competent* witneſſes, though the jury, from other circumſtances, will judge of their *credibility*. *Infamous perſons* are ſuch as may be challenged as jurors, *propter delictum*; and therefore, never ſhall be admitted to give evidence to inform that jury, with whom they are too ſcandalous to aſſociate. Of this we ſhall ſay more in its proper place.

§ An infidel may be a witneſs. 2 Stra. 1140.

† Black. Com. L. iii. c. 23.

Intereſted witneſſes may be examined upon a *voir dire*, if ſuſpected to be ſecretly concerned in the event; or their intereſt may be

be proved in court, which laſt is the only method of ſupporting an objection to the former claſs; for no man is to be examined to prove his own infamy [a].

One witneſs (if credible) is *ſufficient* evidence to a jury, of any ſingle fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law conſiders that there are many tranſactions to which only one perſon is privy; and therefore does not *always* demand the teſtimony of two, as the civil law univerſally requires. "*Unius reſponſio teſtis, omnino non* "*audiatur.*" This abſurdity occaſions the civil law courts ſometimes to admit the oath of the party himſelf. By this device, as Mr. J. *Blackſtone* obſerves, ſatisfying at once the forms of the Roman law, and acknowleging the ſuperior reaſonableneſs of the law of England, which permits one witneſs to be ſufficient, where no more are to be had; and, for the avoiding all temptations to perjury, lays it down as an invariable rule, that *nemo teſtis eſſe debet in propria cauſa.* Cod. 4. 20. 9. Black. Com. L. 3. c. 23.

(*e.*) *Of* proof.

Positive *proof* is always required, where, from the nature of the caſe, it appears it might poſſibly have been had. But, next to *poſitive* proof, *circumſtantial* evidence, or the doctrine of *preſumptions* muſt take place; for when the fact itſelf cannot be demonſtratively evinced, that which comes neareſt to the proof of the fact, is the proof of

[a] As to the *competency* and *incompetency* of witneſſes, &c. we ſhall treat more fully hereafter.

thoſe

those circumſtances which either *neceſſarily*, or *uſually*, attend ſuch facts; and theſe are called *preſumptions*, which are only to be relied upon, until the contrary be actually proved. *Stabitur præſumptioni donec probetur in contrarium*. *Violent preſumption* is many times equal to full proof; for there thoſe circumſtances appear which neceſſarily attend the fact. *Probable preſumption*, ariſing from ſuch circumſtances as *uſually* attend the fact, hath alſo its due weight. *Light* or raſh preſumptions have not any weight or validity.

Co. Lit. 373. Ibid. 6. 2 New Ab. 311, &c.

(*f.*) *Of the witneſs's* Oath.

The OATH adminiſtered to the witneſs is not only that, what he depoſes ſhall be true, but that he ſhall alſo depoſe the *whole* truth; ſo that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.

(*g.*) *Of* the manner of *giving evidence*—*Of* the *duty* of the *judge*—*Of demurrers to evidence*—and *Of* the *ſuperiority* of *trial* by *jury*.

All evidence is to be given in open court, in the preſence of the parties, their attornies, the counſel, all by-ſtanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly ſtated, and by the judge are openly and publicly allowed or diſallowed in the face of the country, which muſt curb any ſecret bias or partiality that might ariſe in his own breaſt. And if, either in his directions or deciſions, he mis-ſtates the law through

ignorance,

ignorance, or by inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err; and this he is obliged to seal by the statute *Westm.* 2. 13 *Edw. I. c.* 31. or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated; and if he return, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This *bill of exceptions* is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below: But a *demurrer to evidence* shall be determined by the court, out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which, there arises a doubt in law. In such case, the adverse party may, if he please, demur to the whole evidence, which admits the truth of every fact that hath been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue. This draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these *demurrers to evidence*, nor *bills of exceptions*, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court, in granting a *new trial*, which is now commonly had for the misdirection of the judge at *nisi prius*.

Reg. Br. 182. 2 Inst. 487.

Co. Lit. 72. 5 Rep. 104.

This

Hale, hist. C. L. 254, 5, 6.

See farther as to trial by jury, Fortescue's preface to his reports, and the preface to Williams's reading on the Stat. 35 H. 8. C. 6. in a work intituled, "The "excellency "and præhemi- "nence of the "law of Eng- "land above "all other hu- "mane laws, in "the world," published A. D. 1680.

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the investigation of truth, than the private and secret examination of witnesses, taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose *that* in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up the depositions in his own forms and language; but the witness is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: the confronting of adverse witnesses also affords another opportunity of obtaining a full discovery, which can never be had in any other mode of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is enabled by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence, have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all per-

sons

sons must appear alike, when their depositions are reduced to writing, and read to the judge in the absence of those who made them: besides, as much may frequently be collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English, way of giving testimony *ore tenus*.

(*h.*) *Of the antient doctrine of* attaint.

With respect to such evidence as the jury may possess by their private knowledge of facts, it was an antient doctrine that they had as much right to govern their judgment by it, as by the written or parol evidence which was delivered in court; and therefore it hath been often held, that though no proofs were produced on either side, yet the jury might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed to be the finding it according to the best of their own knowledge. This construction was probably made out of tenderness to juries, that they might escape the heavy penalties of an *attaint*, in case they could shew by any additional proof, that their verdict was agreeable to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in court.

Year book, 14 Hen. VII. 29. Hob. 227. 1 Lev. 87.

Vaugh. 148, 9.

(*i.*) *Of the practice of granting* new trials.

The above doctrine was gradually exploded, when *attaints* began to be disused, and *new trials* were introduced in their stead: For it

it is incompatible with the grounds upon which ſuch *new trials* are every day granted, *viz.* that the verdict was given *without* or *contrary* to evidence. And therefore, together with *new trials*, the practice ſeems to have been firſt introduced, which now univerſally obtains, that if a juror knows any thing of the matter in iſſue, he may be ſworn as a witneſs, and give his evidence publicly in court.

Styl. 233. 1 Sid. 133.

(*k.*) *Of proceedings and evidence in* equity.

Tr. Eq. 122, &c.

As to proceedings in EQUITY, the Engliſh courts, in determining the qualifications of witneſſes, follow the law; and it ſeems the chancellor, *&c.* cannot do otherwiſe. And, therefore, if a man be rendered *infamous* in law, as by an infamous judgment, or has not *diſcretion* or *underſtanding*, *&c.* his teſtimony is not to be admitted. And the caſes where the party is concerned *in intereſt*, though never ſo ſmall, have uſually prevailed, unleſs in ſpecial inſtances. As 1*ſt*, For *neceſſity*, where no other evidence could poſſibly be had, as, where a man tears a note, or a goldſmith's apprentice overpays a bill of exchange. 2*dly*, *In odium ſpoliatoris*, the oath of a party injured ſhall be a good charge on him who did the wrong. 3*dly*, After great length of time, as in an account of twenty years ſtanding, the party may prove by oath what he cannot prove otherwiſe. 4*thly*, Of ſmall ſums in an account, as under 40 *s.* he ſhall be diſcharged by his oath, but he ſhall not charge another ſo. And this rule extends no farther than the ſum of 100 *l.* and he muſt mention to whom paid, for what, and when; for in an account he

he muſt prove the particulars. 5thly, Where he has releaſed his intereſt, though the releaſe was ſealed in court, whilſt the cauſe was trying. 6thly, *Particeps criminis* is admitted to prove matters of fraud, eſpecially where what he proves is to his own prejudice. 7thly, If one be made a defendant by covin, to take away his teſtimony, and it appears upon the evidence, he may and ought to be allowed as a witneſs. Yet this cannot be a general rule, but every caſe ſtands upon its own circumſtances, that is, whether the intereſt of the parties is ſo great that it may be preſumed to make them partial: but if it is very ſmall, *viz.* ſo trifling that it cannot be preſumed they will be partial, they are competent; therefore alms-people and ſervants are good witneſſes. It is alſo uſual for a legatee of a ſmall legacy, as 5 *s.* to a private perſon, or 5 *l.* to a nobleman, to be admitted a witneſs for the will.

Vide Vern. 254. But though this was formerly ſuppoſed to be ſo, it is otherwiſe now, and the ſmalleſt intereſt, diſqualifies the witneſs, unleſs excepted by Stat. 25 Geo. 2. c. 6. Vide Poſt B. II. [2.]

As to evidence, the uſual courſe in Chancery is by depoſitions, for no witneſſes *viva voce* are allowed at the hearing, except by ſpecial order. Where there is the ſame queſtion in a ſecond cauſe, and the defendant's defence is the ſame, the depoſitions in the former cauſe ſhall be read againſt him. But depoſitions in another cauſe, in which the matters in queſtion were not in iſſue, ſhall not be read. So depoſitions taken in a ſuit between other perſons, are not to be given in evidence, the party not having had an opportunity to croſs examine the witneſſes. So depoſitions taken in a cauſe, where the plaintiff's father was a party to the ſuit, being in all matters the ſame (his father being only tenant for life,) thoſe depoſitions could not be

Vide Poſt A. I. (II.) [4]

be read against the plaintiff, as the advantage ought in all cases to be reciprocal. Where the cause is dismissed, *the matter of it not being proper for equity* to decree, yet the fact proved in this cause may be used as evidence between the *same parties*, whenever it shall come in question again: but when a cause is dismissed, not upon this ground, but for *irregularity*, so that in truth there never was regularly any such cause in court, and consequently no proofs, the proofs given in that cause cannot be used; for proofs cannot be exemplified without bill and answer, nor can they be read at law, unless the bill upon which they were taken can be read. *Lastly*, No depositions ought, generally, to be allowed which were not taken in a court of record. Depositions are in some respects like examination of witnesses; so that although the defendant may read what part he will, yet the other side may read the whole afterwards: of this more hereafter.

Although all exhibits proved by the depositions may be read at the hearing, yet they must be shewn forth in court if the party would have any benefit of them. Parties and privies ought to shew an original deed; every deed ought to prove itself, or be proved by others; but strangers to a deed, and who do nothing in right of a grantee, *&c.* as bailiff or servant, may plead a patent or deed without shewing it. Where a plaintiff makes title under a will, the original must be shewn to the court, and not a copy; otherwise where it is by way of circumstance: but where a deed or other evidence is suppressed, the court will always intend a title against him who suppresses it: but a copy of a deed, supposed

Query, If this doctrine is not too general?

posed to be suppressed, is not allowed unless examined, not even upon affidavit that the plaintiff had got it, but the defendant shall be left to recover it at law. So, although a recital of a lease in a deed of release is good evidence of such lease, against the releaser and those that claim under him, yet as to others it is not, without proving there was such a deed, and that it was lost or destroyed. In case of an inrolment for safe custody, the deed may be said to be recorded, yet a copy of it is not evidence, nor is the inrolment itself, without particular circumstances to support it, as proving that the original deed was in the defendant's custody or power, or accidentally lost, &c. but where a bargain and sale is inrolled pursuant to the statute, the inrolment is a record, so that a copy of it may be read in evidence, as no rasure or interlineation shall be intended in a record, for the heighth and solemnity of it; but the sure way is to exemplify it under the great seal, or at least under the seal of the court.

Vide Post A. II. (1.) (k.)

Vide Post, A. II. (1.) (e.) (1.) (2.) (3.) (4.)

Of averments and parol evidence.

Records, when perfect, for avoiding infiniteness, which the law abhors, estop all parties and privies from contradicting any thing apparent in them. A record cannot be confessed and avoided; as to say, that he was not a person able, &c. for then every record might be so avoided by a nude averment. But to take an averment which stands with the record, and which does not contradict any thing in the record apparent to the judges, by construction of law upon the words, is well admitted and allowed of

* Query, If indenting is material?

by the law. A deed indented * is the deed of both parties, though the words are the words of but one, for both seal it, and of consequence are estopped by it, *viz.* in all the material and essential parts, without which it would not be good; otherwise of a patent or deed poll, because the estoppel there is not mutual, as an estoppel ought to be. But to a deed *non est factum* may be pleaded, *et pari ratione*, it may be confessed and avoided, as by coverture, or the like. And although a deed is *prima facie* an *estoppel*, yet any matter of fact may be pleaded or averred, which stands with the words of the deed. But no averment can be taken against the judgment of law, which appears to the judges upon view of the deed; for matter of fact is to be tried by a jury, but matter of law by the judges only. Yet in case of *estoppels*, if a verdict be against the truth, or the law, as being founded upon an untrue presumption, Chancery will relieve *. And although equity will not draw in question such assurances as are used for the common repose of men's estates, (for a fine with proclamations ought, after five years, to be a bar in conscience, as it is in law, so shall it be of a common recovery for docking the entail,) yet if a fine is unfairly obtained, equity will order a reconveyance, and the court where it is acknowledged will vacate it for error or irregularity; neither is a judgment at law to be pleaded in bar to a suit in equity, notwithstanding the statute of 4 *H.* 4. *c.* 22. because that statute meant only to restrain such jurisdiction as did take

Collins and Blantern, 2 Wilf. 341, &c. Debt on bond-plea (after oyer of the bond and condition, which was for payment of money on a specific day,) that the bond was given to indemnify plaintiff against a note for the same sum, given by him to the prosecutor of five indictments for perjury, not to appear and give evidence; and therefore that the bond was void in law. Demurrer and joinder, and after two arguments, judgment for the defendant.

* Relief may now, in general, be had by new trial.

upon

upon it to reverse the judgment, as error and attaint will do, which the Chancery never pretends to, but leaves the judgment in peace, and only meddles with the corrupt conscience of the party. And although it is said, that the common law used some power to restrain such examinations directly,* before any statute made, yet these seem rather to examine the *manner*, than the very *matter* and substance of the thing adjudged. It might be so formerly; it is otherwise now.

So in natural justice, deeds and writings are considered only as memorials of the contract, not as a substantial part of them; and therefore any other proof is as well, and the *estoppel* will not in equity be regarded against the truth. As if a covenant be general, that he was lawfully seised, and there is proof that it was declared upon sealing, that he should undertake for his own act only, he shall be relieved. So if in the purchase of a manor, a copyhold (a little before escheated) was not intended to pass in demesne, and was left out of the particular; and yet the conveyance was sufficient to pass it at law, the vendor shall be relieved in equity. So where a lease for years was made to trustees, precedent to the wife's settlement, only to protect the wife's estate against the violence of the times, and not to exclude the husband, but the sequestrators; upon proof of this by one single witness, of undoubted reputation, the nature of the case requiring secrecy, Chancery relieved against the trust expressed in the deed. So in case of a surrender made by a steward of a copyhold, if there be any mistake there, that is only matter of fact, and the courts at law

C will,

will, in that caſe, admit an averment, that there was a miſtake, &c. either as to the lands or uſes.

As for a teſtament proved *ſub ſigillo Epiſcopi* it is no *eſtoppel*. Yet the laſt will of a man is looked upon as the laſt ſerious act of his life, with reſpect to the diſpoſition of his eſtate, and muſt be admitted ſufficient to repeal all former wills, and much more to control all parol declarations. It is to be conſidered therefore, as it ſtands upon the will alone, and would have been ſo, even before the ſtatute of frauds and perjuries; for by the ſtatute of wills, by which men are enabled to make wills, and deviſe their lands, it muſt be a will in *writing*, and ſhould parol proof be admitted, it would introduce very great uncertainty, and infinite inconvenience. But this rule has received a diſtinction, which has greatly prevailed, *viz.* between evidence offered to a court, and evidence offered to a jury; for in the laſt caſe, no parol evidence is to be admitted, leaſt the jury might be inveigled by it; but in the firſt it can do no hurt, being to inform the conſcience of the court, which cannot be biaſſed or prejudiced by it. And therefore, though ſuch an averment could not be admitted, where it was to make the party a title, yet where it was only to rebut an equity, it might. As where *A.* charged his real eſtate with payment of his legacies and debts, and deviſed his eſtate ſo charged, to the defendant his nephew, and made the plaintiff's wife executrix. Proofs were admitted that it was *A.*'s intention, that *ſhe* ſhould have the perſonal eſtate clear of the

debts.

debts. And if it were taken from her by the creditors, ſhe ſhould come in as a creditor on the real eſtate. So where a money-legacy given to an executor ſhall exclude him from the ſurplus, the preſumption being that the teſtator did not intend him all and ſome; yet ſuch preſumption may be ouſted or taken away by proof of the teſtator's intention, that his executor ſhould have the ſurplus, or that his next of kin ſhould not have it, eſpecially if a ſpecific legacy were given to the next of kin, for one may aver the truſt of a perſonal eſtate. So the conſtruction of making a gift a ſatisfaction, has in many caſes been carried too far; it is therefore reaſonable in ſuch caſes to admit of parol proof as to the teſtator's intention; however, the later reſolutions have been very cautious of admitting parol evidence, becauſe it encourages ſuits and litigations, and introduces the very miſchiefs which the ſtatute intended to prevent.

But although no proof ought to be received to ſupply the words of a will, ſince the will that muſt paſs land, muſt be in writing, and muſt be determined only by what is contained in the written will; yet there can be no hurt in admitting collateral proof, to make certain the perſon or the thing deſcribed. As where *A.* deviſed to *B.* lands of 60*l.* *per annum*, paying 100*l.* which he by bond owed *I. N.* it happened that the 100*l.* by bond was not due to *I. N.* but to *S. H.* and the perſon who drew the will having ſworn, that the teſtator intended the debt to *S. H.* the deviſee of the lands was held liable. So to aſcertain the thing, notwithſtand-

ing the ſtatute of frauds, for it neither adds to nor alters the will, but only explains which of two or more meanings ſhall be taken. Yet ſome have doubted whether they could read the evidence of witneſſes on a will of lands by the ſtatute, though it were only in preſervation of the deviſe; but to be ſure, if the deviſe would admit of any ſenſe, they could not be read. And it is a ſetled rule in the court of Chancery, that although they will read *parol* proof to *fortify* any natural conſtruction that ariſes from the words of the will; yet they will never read any *parol* proof to make any *alteration* in the will, or addition to it. And if the bequeſt cannot be made out but by *parol* depoſition of the witneſſes, there being only initial letters for the names of the legatees, as it is not ſubſtantive in writing, it is not a written, but nuncupative will, and therefore being without the circumſtances required by the ſtatute, is void.

(l.) Of a diſcovery in equity.

Tr. Eq. 128, &c. In the law of nature, when deeds and undeniable inſtruments cannot be produced, judgment muſt then be given according to the teſtimony of witneſſes, or the one party muſt, with conſent of the other party, depoſe upon oath. We ſay with the conſent of the other party, for elſe in the liberty of nature, no man is obliged to put the iſſue of his cauſe upon another man's conſcience. And in the civil law, the judge *ex officio*, if he ſaw occaſion, might put the defendant to his oath, or the party intereſted might demand it. And this was deciſive between the parties and their

their repreſentatives, but did not hurt a third perſon. So in Chancery, though witneſſes are examined, yet you may afterwards examine the defendant. A bill lies there for the diſcovery of an eſtate by one who had a title to it, as by the patentee of the goods of a felon, or of one outlawed, for outlawry is in nature of a gift or judgment to the king. So where *A.* obtains judgment againſt *B.* and the defendant, to defraud him of the benefit of it, aſſigns his eſtate to truſtees for himſelf, *A.* may have a diſcovery, though it is objected, that this is in the nature of a foreign attachment, and that there could not be a diſcovery of a man's perſonal eſtate in his life time. But if the plaintiff in ſuch caſe hath not taken out execution, it will not be allowed; and it ſeems agreed it would not lie againſt the debtor himſelf, nor to have a general diſcovery from a third perſon, but only for particular things. As where a lighter is overſet by negligence of the lighterman, or a ſhip takes fire by the negligence of the maſter or ſhip's crew, theſe come within the reaſon of the law as to any common carrier, and therefore the party ſhall have a diſcovery to enable him to bring his action. Yet a plaintiff is not admitted to a diſcovery without verifying his title at law *. So that if there be a full anſwer given to the thing in demand, till that be tried, the defendants are not bound to diſcover. As in a bill for tithes, if they plead the ſtatute of 13 *Eliz. cap.* 20. againſt non-reſidence in bar; or in caſe of tithes of conies by cuſtom, if they deny the cuſtom; and the rather, becauſe the demand was againſt common right; and if it ſhould be otherwiſe, then by a feigned ſuggeſtion;

The propoſition here is general, ſed vide infra.

* Vide infra, this explained. In moſt, if not in all caſes, bills for diſcovery ſhould be anſwered before trial at law, or ſuch bills would not be of any uſe.

the defendant might be forced so discover any thing. But if in such case, the matter be found against the defendant, he shall after be examined upon interrogatories. But where there is no such great inconvenience, as upon a bill against an executor to discover assets, he must answer, though he denies the debt, because it concerns the act of another. As to the difference of the persons, *for whom* and *against whom* a discovery will be admitted, it is to be observed, that persons who claim lands by a will, or any other voluntary disposition, having the law on their side, are intitled, as against an heir at law, to a discovery in equity of deeds relating to the estate, and to have them delivered up; otherwise the heir might defend himself at law by setting up prior incumbrances, and by that means prevent the trying the validity of the will. So where a will concerning a personal estate is proved in the spiritual court, another having a former will in his favour, may bring his bill to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable, and imposed on, though it be objected that it belongs to the spiritual court only, to prove the validity of the will, and that the former will was not proved in the spiritual court, as the will in the defendant's favor was. But if a bill is brought by a remote heir for a discovery of a title, for evidence, to have terms removed, and the title at law cleared; this is one of the hard cases at law, where equity will not assist; for as equity will not relieve the children, should the remote heir recover, so neither will it assist the remote heir. And purchasers shall

not

not be obliged to discover, to impeach or weaken their title; for by this method all purchases might be blown up. As whether in a mortgage made by *A.* to *B.* which had been assigned to the defendant, there was not some trust declared, for the benefit of the plaintiff, though plaintiff charged in his bill, that such a lease in defendant's custody mentioned it; for this is but a side wind to make a purchaser expose his title, and the court will not do it, unless the plaintiff gives some proof towards falsifying the answer, to induce the court to do it. So an assignee of a lease shall not be forced to discover whether the lease was expired. So there is no reason to compel one whose lands lie contiguous to mine, to discover the boundaries in his deeds; for that would be to help one man to evinence to evict another of his possession. So the court will never help the issue against a purchaser. But where it is a bounty, as a voluntary devise to the wife for life, in such case the heir having a good title, *viz.* as heir in tail to his great grandfather, or the like, shall be aided. But with respect to the personal estate, there is a difference between contracts that are negotiable, and such as are not; or where they are not negotiated in a mercantile way, where a note passes as ready money. As if it were assigned as a collateral security for a debt already contracted; for there, if the note was fraudulently obtained, or by gaming, there is not any remedy against the drawer. But if he actually negotiates it for value, the indorsee shall in all events, have his money of the drawer[b], though he has paid it

[b] *Contra* by the stat. 9 *Ann. c.* 14. in the case of a gaming debt.

before,

before, or it was obtained by fraud, if unknown to the indorsee, because he has a legal right to the note, and a legal remedy at law which a court of equity ought not to take from him, and it would be to the ruin of all commerce, if the original cause, and consideration of such note, should be inquired into. But the assignee of a *chose in action* (notes and bills of exchange excepted) has no remedy at law, or right to sue in his own name, and has only an equitable remedy. And this fails, when a bond or covenant is obtained by fraud, or the obliger has a legal discharge, as a release upon payment of the money. So if the bond were assigned for value before payment, there an equitable interest passes, and in such case, if the obligor pays the money to the obligee, and cannot plead such payment at law, a court of equity will not interpose to assist him. But if he can, equity will not interpose to assist the assignee. In the civil law, the oath was only to be tendered in civil matters, when the facts and circumstances might render the use of an oath just and decent, and not in criminal matters, any more than in the law of *England*. And it is a standing rule in equity, that no one is bound to betray himself: for it is the business of courts of equity to relieve against, not to assist *forfeitures*; and by law, no one is bound to discover any matter which tends to subject himself to penalties or forfeitures; as a penal clause in an act of parliament, or in a deed; though said it was not a penalty, but part of the contract. But otherwise, if he covenants not to plead or demur to any bill which should be brought against him in equity, or

Payment may be pleaded by st. 4 An. c. 16. § 12.

the plaintiff waives the penalty. And ſuch pleas which tend to the ſupport of wrong doing, ought to have the greateſt ſtrictneſs and exactneſs. In ſome caſes, even for a treſpaſs, a bill is proper enough in this court, *viz.* where by the ſecret contrivance of it, it cannot eaſily be proved. As if a man in his own ground digs away under-ground to my mineral, and the like. So in caſe of a bill by the *Eaſt-India* Company for a diſcovery, and to prevent an interloper's trading to the *Eaſt-Indies*, where there is great difficulty as to the proof, (the matter for the greateſt part having been tranſacted in the *Eaſt-Indies*, and the plaintiffs ſetting forth, that they were willing to waive the forfeiture) there ſhall be a diſcovery. So where the charge was not by way of treſpaſs, but under colour of title, as that defendant, by colour of ſequeſtration by the committee, had ſeized [illegible] and tithes, &c. due to plaintiff, he was allowed to pray a diſcovery of the particulars ſo taken, and their value. So where a man, by colour of a title, enters into an houſe, &c. and poſſeſſes himſelf of the goods, &c. for it may be impoſſible for the plaintiff to diſcover the particulars without ſuch bill. So where a will is proved, and the precedent adminiſtration revoked, ſuch bill is uſually neceſſary for the diſcovery of the goods; and yet in ſtrictneſs of law there was a treſpaſs.

Query, If the defendant ſhall be bound to diſcover any thing to his own prejudice?

(m.) Of

(*m.*) *Of* PLEAS of the CROWN, generally.

4 Black. Com. 356.

THE doctrine of evidence upon PLEAS of the CROWN is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes and resolutions, a difference is made between *civil* and *criminal* evidence.

First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 *Edw.* VI. *c.* 12. and 5 & 6 *Edw.* VI. *c.* 11. *two* lawful witnesses are required to convict a prisoner, unless he shall willingly and without violence confess the same. By statute 1 & 2 *Ph.* & *Mar. c.* 10. a farther exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by *c.* 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 *W.* III. *c.* 25. & 15 & 16 *Geo.* II. *c.* 28. in their subsequent extensions of this species of treason, do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But by statute 7 *W.* III. *c.* 3. in prosecutions for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the

the confession of the prisoner, which shall countervail the necessity of such proof, must be in open court; and it is declared that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason, and not of distinct heads or kinds; and no evidence shall be admitted to prove any overt act not expresly laid in the indictment. And therefore in Sir *John Fenwick*'s case, in king *William*'s time, where there was but one witness, an act of parliament was made on purpose to attaint him of treason, and he was executed *. But in almost every other accusation, one positive witness is sufficient. Baron *Montesquieu* lays it down for a rule, that those laws which condemn a man to death *in any case*, on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance; there is a necessity therefore (as he says) to call in a third man to incline the scale. But this seems to be carrying matters too far; for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictment for perjury, this doctrine is better founded; and there our law adopts it; for one witness is not allowed to convict a man indicted for perjury, because then there is only one oath against another. In cases of treason also there is the accused's oath

See St. Tr. II. 144. Foster 235.

Stat. 8 W. III. c. 41.

* Not much to the credit of those who passed it.

St. Tr. V. 40.

Sp. L. b. 12. c. 3.

Beccar. c. 13.

10 Mod. 194.

oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him; though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of crafty and profligate politicians in all ages.

St. Tr. VIII. 472. 2 Hawk. P. C. 431.

'*Secondly*, though from the reversal of Colonel *Sidney*'s attainder by act of parliament in 1689, it may be collected that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.

Lord Preston's case, A.D. 1690. St. Tr. IV. 453. Francia's case, A.D. 171. St. Tr. VI. 69. Layer's case, A.D. 1722. ibid. 279. Henzey's case, A.D. 1758. 4 Burr. 644.

Thirdly, by the stat. 21 *Jac.* 1. *c.* 27. a mother of a bastard child, concealing its death, must prove by one witness, that the child was born dead; otherwise such concealment shall be evidence of her having murdered it.

Vide Bl. Com. L. IV. c. 24.

Fourthly, all presumptive evidence of felony should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.

2 Hal. P. C. 290.

And Sir *Matthew Hale* in particular, lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: And, 2. Never to convict any person of murder or man-slaughter,

ſlaughter, till at leaſt the body be found dead, on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing.

Laſtly, It was an antient and commonly received practice, (derived from the civil law, and which alſo to this day obtains in the kingdom of *France*) that, as counſel was not allowed to any priſoner accuſed of a capital crime, ſo neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be remembered, to the honour of *Mary* I. (whoſe early ſentiments, till her marriage with *Philip* of *Spain*, ſeem to have been humane and generous *,) that when ſhe appointed Sir *Richard Morgan* chief-juſtice of the common-pleas, ſhe enjoined him, " that notwithſtanding the " old error, which did not admit any witneſs " to ſpeak, or any other matter to be heard, " in favour of the adverſary, Her Majeſty being party; Her Highneſs' pleaſure was, that " whatſoever could be brought in favour of " the ſubject ſhould be admitted to be heard: " and moreover, that the Juſtices ſhould not " perſuade themſelves to ſit in judgment, " otherwiſe for Her Highneſs than for her " ſubject." Afterwards, in one particular inſtance (when embezzling the queen's military ſtores was made felony by ſtatute 31 *Eliz.* *c.* 4.) it was provided that any perſon impeached for ſuch felony, " ſhould be received " and admitted to make any lawful proof that " he could, by lawful witneſs or otherwiſe, " for his diſcharge and defence:" and in general the courts grew ſo heartily aſhamed of a doctrine ſo unreaſonable and oppreſſive, that

St.Tr. I. paſſim.

Domat. publ. law, l. 3. t. 1. Monteſq. Sp. of L. 29. c. 11.

* 4 Black. Com. 17.

Holingſh. 1112. St. Tr. I. 72.

a practice

a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir *Edward Coke* protests very strongly against this tyrannical practice; declaring that he never read in any act of parliament, book-case, or record, that in criminal cases, the party accused should not have witnesses sworn for him; and, therefore, there was not so much as *scintilla juris* against it. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between *England* and *Scotland*, when felonies committed by Englishmen in *Scotland* were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it, against the efforts of both the crown and the house of Lords, against the practice of the courts in *England*, and the express law of *Scotland*, "that in all such "trials, for the better discovery of the truth, "and the better information of the consciences "of the jury and justices, there shall be allowed to the party arraigned the benefit of "such credible witnesses, to be examined "upon oath, as can be produced for his "clearing and justification." At length by the statute 7 *W*. III. *c*. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 *Ann*, *st*. 2. *c*. 9. that in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

2 Bulst. 147. Cro. Car. 292.

3 Inst. 79.

See also 2 Hal. P. C. 283. and his summary, 264.

Stat. 4 Jac. I. c. 1.

Com. Journ. 4. 5. 12. 13. 15. 29. 30 June, 1607.

Ibid. 4 June, 1607.

BEFORE

Before we close this introductory part, it may not be amiss to give the *general rules of evidence* at one view, and to say something further upon *the weighing of evidence*, and *presumptions*.

(n.) General rules of evidence.

1. The FIRST general rule is, that you must (as before observed) give the best evidence of which the nature of the thing is capable: the true meaning of this rule is, that no such evidence shall be brought that *ex natura Rei* supposes still greater evidence behind in the possession or power of the party, for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced; for if the other greater evidence did not make against the party, why did he not produce it to the court? As, if a man offer a copy of a deed, or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence; but if he prove the original deed, or will, in the hands of the adverse party; or that it be destroyed without the default of the person producing such evidence, a copy will be admitted, because it is then the best evidence; the presumption of greater evidence behind in the party's possession being overturned by positive proof. B. N. P. 293. last edit.

2. The SECOND general rule is, that no person *interested* in the question can be a

witneſs: there is not any rule in more general uſe, and none that is ſo little underſtood; we have therefore endeavoured in this work to explain it, and ſet down the ſeveral exceptions to the rule.

*Vide the Introduction.

3. The THIRD general rule is, that *hearſay* is not evidence. For no evidence is to be admitted, but what is upon oath; and if the firſt ſpeech were without oath, another oath that there was ſuch ſpeech, makes it no more than a bare ſpeaking without oath, and ſo of no weight in a court of juſtice. Beſides, if the witneſs be living, what he has been heard to ſay, is not, undoubtedly, the beſt evidence. But though hearſay be not allowed as direct evidence, yet it may be admitted in corroboration of a witneſs's teſtimony, to ſhew that he affirmed the ſame thing before on other occaſions, and that he is ſtill conſiſtent with himſelf.

1 Mod. 283.

So where the iſſue is on the legitimacy of the plaintiff or defendant, it ſeems the practice to admit evidence of what the parents * have been heard to ſay, either as to their being or not being married; and with reaſon, for the preſumption ariſing from the cohabitation, is either ſtrengthened or deſtroyed by ſuch declarations, which are not to be given in evidence directly, but may be aſſigned by the witneſs as a reaſon for his belief one way or the other. But in *Pendrel* and *Pendrel*, *Hil.* 5. *G.* 2. Lord *Raymond* would not ſuffer the wife's declarations, that ſhe ſhould not know her huſband by ſight, *&c.* to be given in evidence 'till after ſhe had been produced on the other ſide. So hearſay is good evidence to prove who is my grandfather, when he married, what children he had,

* This muſt mean it dead.

Grimwade and Stephens, Kent, [illegible].

had, &c. of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea dead, and the common reputation and belief of it in the family, gives credit to such evidence; and for a stranger it would be good evidence if a person swore that a brother or near relation had told him so, which relation is dead. In an ejectment between the Duke of *Athol* and Lord *Ashburnham*, *E.* 14. *G.* 2. Mr. *Sharpe*, who was attorney in the cause, was admitted to prove what Mr. *Worthington* told him he knew, and had heard, in regard to the pedigree of the family. Mr. *Worthington* happened to die before the trial. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove *general reputation*; and where the issue was of a right to a way over the plantiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. In a *quare impedit* the plaintiff derived his title from Lord *R.* on whom he laid a presentation of one *Knight*; the Bishop set up a title in himself, and traversed the seisin of Lord *R.* The plaintiff gave in evidence an entry in the register of the diocese of the institution of *Knight*, in which there was a blank in the place where the patron's name is usually inserted, upon which he offered parol evidence of the general reputation of the country, that *Knight* was in by the presentation of Lord *R.* Upon a bill of exceptions, this came upon a writ of error into *K. B.* where the better opinion was, that the evidence was allowable; the

Skinner v. Lord Bellamont, Worcester, 1744.

Bp. of Meath, v. Lord Belfield, 1747.

 register,

regiſter, which was the proper evidence, being ſilent. A preſentation may be by *parol*, and what commences by *parol*, may be tranſmitted to poſterity by *parol*, and that creates a general reputation.

4. The FOURTH general rule is, that in all caſes where a general character or behaviour is put in iſſue, evidence of particular facts may be admitted; but not where it comes in collaterally. This has ſometimes occaſioned a queſtion in Chancery, Whether it were in iſſue or not? As where a bill was brought by a kept miſtreſs for an annuity; the defendant in his anſwer ſaid, "She was a lewd woman of infamous character before Mr. *P.* became acquainted with her;" and it was holden to be ſufficiently putting her character in iſſue, to enable the defendant to prove particular facts. But where upon a bill brought by a wife, the huſband in his anſwer ſaid, "She had not behaved herſelf with duty and tenderneſs to him, as became a virtuous woman, much leſs his wife;" this was holden not to put adultery in iſſue, ſo as to enable the huſband to prove particular facts. In an action for criminal converſation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a baſtard before marriage; becauſe by bringing the action, the huſband puts her general behaviour in iſſue. And as the defendant may examine to particular facts, *à fortiori* he may call witneſſes to her general character. So in caſes where the defendant's character is put in iſſue by the proſecution, the proſecutor may examine to particular facts, for it is impoſſible without it to prove the

Clerk v. Periam, 27 July, 1742.

Lord Doneraile, v. Lady Doneraile in Dom. Proc. 1734.

Roberts, v. Maliſon, per Willes, C. J. at Hereford, 1745.

the charge. Yet there is one caſe of that ſort, in which the proſecutor is not allowed to examine to any particular fact, without giving previous notice of it to the defendant; and that is, where a man is indicted for being a common barretor; and the reaſon is, ſuch indictments are commonly againſt attornies, whoſe profeſſion it is to follow law-ſuits; and it is a difficult matter to draw the line between that, and acting as a barretor; therefore it makes it neceſſary for him to know what particular facts are to be given in evidence, that he may be prepared to ſhew, that he was fairly employed in thoſe caſes, and acted in his profeſſion. But in other criminal caſes, the proſecutor cannot enter into the defendant's character, unleſs the defendant enable him ſo to do, by calling witneſſes in ſupport of it, and even then the proſecutor cannot examine to particular facts, the general character of the defendant not being put in iſſue, but coming in collaterally. For the ſame reaſon if you would impeach the credit of a witneſs, you can only examine to his general character, and not to particular facts; every man is ſuppoſed to be capable of ſupporting the one, but it is not likely he ſhould be prepared to anſwer the other, without notice; and unleſs his general character and behaviour be in iſſue, he has no notice.

5. The FIFTH general rule is, *Ambiguitas verborum latens verificatione ſuppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.* Therefore, where the teſtatrix deviſed her eſtate to her couſin, *John Cheere*, there being both father and ſon of that name, *parol* evidence was admitted to prove

Jones and Newman, Tr. 24 G. 2.
Cheney's caſe, 5 Co. S. P.

Vide Introduction.

prove that the son was the person meant; for the heir's objection arose from *parol* evidence, and therefore *parol* evidence ought to be admitted to answer it.[a] So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*, circumstances may be given in evidence to prove which manor he intended; for this is not to contradict the record, but to support it.

2 R. A. 676.

Lord *Bacon*, in his reading upon this maxim, distinguishes ambiguity into *Patens* and *Latens*, and saith that *Latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed, that breeds the ambiguity; but *ambiguitas Patens*, *i. e.* that which appears to be ambiguous upon the deed, or instrument, is never helped by averment; for it were in effect to make that pass without deed, which the law appoints shall not pass but by deed; therefore where the devisee's name is totally omitted, *parol* evidence cannot be admitted to shew who was meant; and as *parol* evidence will not be admitted to explain an ambiguity which is *patens*, much less will it be admitted to alter the apparent meaning of the will: Therefore where a man gave two thousand pounds to his brother *John*, and in case of his death, to his wife, Lord Chief Justice *Lee* would not suffer proof to be given that the testator meant his brother should have it only during life. But where *A.* devised four hundred pounds to his wife, and made her executrix, without disposing of the surplus, Lord Chancellor *Hardwicke* admitted *parol* evidence, to shew the testator meant his wife should have it; for there was

Ballis and Church, v. Att. Gen. 29 Jan. 1741. per Hardw. Canc.

Lowfield and Stoneham, C. Hall. 1746.

Lake and Lake, 8 Nov. 1751.

was no ambiguity in the will, nor was it to alter the apparent intent of the teſtator; for by law ſhe was intitled to the ſurplus as executrix, therefore the evidence was admitted only to rebut the equity. But in *Brown* and *Selwin*, in *Dom. Proc.* 1734, the teſtator having expreſly deviſed the reſidue of his perſonal eſtate to his executors, one of whom owed him money upon bond, *parol* evidence was refuſed to be admitted to prove the teſtator meant to extinguiſh the bond debt, by making the obligor executor; for that would have been to have altered the apparent intent, and not ſimply to have rebutted an equity.

6. The SIXTH general rule is, in every iſſue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is ſufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other ſide may conteſt it with oppoſite proofs; for this is not properly the proof of a negative, but the proof of ſome propoſition totally inconſiſtent with what is affirmed; as if the defendant be charged with a treſpaſs, he need only make a general denial of the fact; and, if the fact be proved, then he may prove a propoſition inconſiſtent with the charge, as that he was at another place at the time, or the like.

But to this rule there is an exception of ſuch caſes where the law preſumes the affirmative contained in the iſſue. Therefore, in an information againſt Lord *Halifax*, for refuſing to deliver up the rolls of the auditor of the exchequer; the court of exchequer put the proſecutor upon proving the negative, *viz.* that he did not deliver them: for

 a perſon

a perſon ſhall be preſumed duly to execute his office till the contrary appear.

7. The SEVENTH general rule is, that no evidence need be given of what is agreed by the pleadings. For the jury are only ſworn to try the matter in iſſue between the parties, ſo that nothing elſe is properly before them. In *replevin* the defendant avowed taking the cattle, *damage feaſant in loco in quo*, as parcel of his manor of *K.* The plaintiff replied, that it was parcel of the manor of *K.* and made title to it, and traverſed that the manor of *K.* was the freehold of the defendant: he was not admitted to prove that *K.* was no manor, for that was admitted by the traverſe.

Dy. 183. C. 58.

The jury cannot find any thing againſt that which the parties have affirmed and admitted of record, though the truth be contrary; but, in other caſes, though the parties be eſtopped to ſay the truth, the jury are not; as in *Goddard*'s caſe, where a bond was dated nine months after the execution, and after the death of the obligor.

2 Co. 4. b.

P. 4. Anne, K. B. Salk. MSS. Note, This caſe was before the ſtat. enabling defendants to plead double.

In treſpaſs for throwing down and carrying away ſtalls, as to all the treſpaſs but the throwing them down, the defendants pleaded not guilty; and as to the throwing them down, a ſpecial juſtification, and therein juſtified both the throwing down and carrying away; and on the iſſue joined, the judge at the aſſizes would not try whether the defendants were guilty or not of carrying away the ſtalls, becauſe they had confeſſed it by their juſtification; and a motion was made for a new trial; but it was denied, becauſe the jury could never find the defendants not guilty, contrary

Query, as to this doctri[ne] where defen[dant] pleads double by virtue of the [ſt]. viz. not [gu]ilty, and a [juſ]tification, [th]ough the juſ[ti]fication admits

trary to their own confession upon the record, though in another issue.

a part of the complaint, yet must not plaintiff first prove the complaint, and where is the difference between the cases?

8. The EIGHTH general rule is, that whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. For example, *A.* cannot justify the killing another, therefore he may give the special matter in evidence on the general issue, as that it was *se defendendo*, &c. So in *trover* for goods, the defendant may give in evidence that he took them for toll, on the general issue of not guilty, because he could not plead it; but it would be otherwise in trespass, for taking the goods, because there he might have pleaded the special matter. 2 R. A. 682. Co. L. 283. 1 Jones, 240.

9. The NINTH general rule is, that if the substance of the issue be proved, it is sufficient. In an action of *waste* for cutting down twenty ashes, proof that he cut ten is sufficient, for in effect, the issue is waste or no waste. So in debt upon a bond conditioned to perform covenants, and breach assigned in cutting down twenty trees. So in account, if the defendant plead an account before *A.* and *B.* and issue thereon, proof of an account before *A.* is sufficient: but if the issue were, whether *A.* and *B.* were churchwardens, proof that one was, and not the other, would not be sufficient. Co. L. 282. Hob. 53. Hob. 55. 2 Rol. 706.

If the issue be, whether *Lord Delaware* demised, proof that *A. B.* who was not then, but now is, *Lord Delaware* is not sufficient, for whether he were at the time of the demise *Lord Delaware* is part of the issue. So in *replevin*, if the defendant avow *damage feasant*, and the plaintiff justify for common, and aver that the cattle were *levant* and *couchant*, 2 Ro. Abr. 706.

and

and issue thereon, proof for part of the cattle only is not sufficient.

1 Sid. 5. The plaintiff declared, that he had *I. S.* and his wife in execution, and that the defendant suffered them to escape. Special verdict that the husband only was taken in execution, (it being for a debt due from the wife before coverture) and that he escaped. The court held that the substance of the issue was found, and gave judgment for the plaintiff.

March 25. In error to reverse a fine, for that the plaintiff was beyond sea, *&c.* if the defendant plead that the plaintiff returned into the realm in *August*, and issue thereupon, if it be proved that he returned at any time within five years, it is sufficient. In debt against an executor, the defendant pleads that the testator was Hob. 53. 4. taken in execution by a *Ca. Sa.* if it be proved that he was taken by an *Alias Ca. Sa.* it is enough, but proof that he had been taken by a *Capias pro fine*, or by a *Capias utlagatum*, would not maintain the plea. If outlawry at the suit of *A.* be pleaded, and the record prove outlawry at the suit of *C.* it is sufficient.

Cro. Car. 151. Debt upon bond against the defendant, as brother and heir to *I. S.* upon issue *riens per descent*, the jury found that the obligor was seised in fee, had issue and died seised, and that the issue died without issue, whereupon the land descended to the defendant, as heir to the son of his brother, and the court held Dy. 368. that the issue was found against the plaintiff; for the defendant had nothing as immediate heir to his brother, and if the plaintiff would charge him as collateral heir, he ought to have a special declaration.

But

But if *A.* ſettle an eſtate upon himſelf for life, remainder to his firſt and other ſons in tail, remainder to his own right heirs, and enter into a bond and die, leaving a ſon who dies without iſſue, whereupon the uncle enters, he may be charged as brother and heir of *A.* for he muſt make himſelf heir to him who was laſt actually ſeized. Carth. 126.

It is neceſſary towards the better comprehending of this rule, to ſee in what caſes *modo et forma* is of the ſubſtance of the iſſue, for where it is, it muſt be proved.

Where the iſſue is joined on the point of the action, there *modo et forma* is mere form, and need not be proved; as where a demandant in *caſu proviſo* counts of an alienation in fee, and the tenant ſays, *non alienavit modo et forma*, and the jury find (or evidence is given of) an alienation in tail, it is ſufficient, for the point and giſt of the writ is, whether tenant in dower aliened to the diſheriſon of the demandant. So in *replevin*, where the defendant avowed the taking as a commoner, *damage feaſant*, the plaintiff in bar ſaid *I. S.* was ſeiſed of an houſe and land, whereto he had common, and demiſed unto him the thirtieth of *March*, to hold from the feaſt of the *Annunciation* next before for a year, the defendant traverſed the leaſe *modo et forma*; the jury found that *I. S.* made a leaſe to the plaintiff on the twenty-fifth of *March* for one year, and though this was not the ſame leaſe as pleaded, for this began *on* the day, and the other *from* the day, yet the plaintiff had judgment; for the ſubſtance of the iſſue was, whether the plaintiff had ſuch a leaſe, as by force thereof he might uſe the common. Co. L. 281. Hob. 72.

Yet

Yet it muſt not depart altogether from the form of the iſſue, as if it had been found that he had a right of common by leaſe from another.

Langdon v. Knight.

L. brought an action upon a promiſſory note of thirty pounds, to which the defendant pleaded, that the plaintiff was indebted to him in a larger ſum, *ſcilicet* ſixty pounds, which far exceeded the damage laid in the declaration; the plaintiff replied, that he was not indebted to the defendant in the ſum of ſixty pounds *modo et forma*, and on demurrer (for the plaintiff might, for any thing appearing to the contrary in his replication, owe the defendant fifty-nine pounds, nineteen ſhillings, and eleven pence halfpenny; and therefore it was inſiſted, that he had tendered an immaterial iſſue) the court held that the ſubſtance of the replication was, that the plaintiff was not indebted to the defendant in ſo much as would exceed his own demand in the declaration; and that was the queſtion for the court and jury, whether he were ſo indebted to the defendant as to exceed his demand, and not preciſely how much; and a caſe was cited by Mr. *Filmer*, which was allowed to be law, where in debt upon bond, conditioned to pay one thouſand pounds, the defendant pleaded that at the time of the bill, the plaintiff owed the defendant fifteen hundred pounds, to which the plaintiff replied, that he was not indebted to him in fifteen hundred pounds *modo et forma* as alleged, and iſſue thereon, and verdict for the plaintiff; and upon motion in arreſt of judgment, one queſtion was, whether the iſſue were well joined, and the court held it was.

Joy v. Roberts, Tr. 5 & 6 G. 2. in Scac.

Covenant

Covenant by a lessee against his lessor, and breach assigned on the covenant for quiet enjoyment, for that the lessor ousted him, —the defendant pleaded, that he entered to distrain for rent, and traversed that he ousted him *de præmissis*; the plaintiff demurred, for that he did not traverse, that he ousted him *de præmissis*, or of any part thereof. *Sed per curiam* the plea is good, and proof of any part, had the plaintiff joined issue, would have been sufficient. 1 Salk. 260.

But when a collateral point in pleading is traversed, then *modo et forma* is of the substance of the issue, and must be proved; as if a feoffment be alleged by *two*, and this is traversed *modo et forma*, and it is found the feoffment of *one*, there *modo et forma* is material: so if a feoffment be pleaded by *deed*, and it is traversed *absque hoc quod feoffavit modo et forma*, the jury cannot find a feoffment *without* deed. Co. L. 282.

But though the issue be upon a collateral point, yet if by finding part of it, it shall appear to the court that no such action lies for the plaintiff, no more than if the whole had been found, there *modo et forma* are but words of form; as in trespass, *quare vi et armis*, if the defendant plead that the plaintiff holds of him by fealty and rent, and for rent behind he came to distrain; and the plaintiff deny that he holds of him *modo et forma*, and the jury find (or evidence prove) that he holds of him by fealty only, the writ shall abate; for by the statute of *Marlb.* c. 3. no tenant can maintain trespass against his lord, so the matter of the issue is, whether he hold of him or not; but it would have been otherwise in *replevin*, for there the avowant

ant being to have a return, must make a good title *in omnibus*.

(o.) Of the weighing of evidence.

G. L. E. 156. We come now to set the several bounds of credibility where there are contrary proofs.

In contrary proofs, if men's swearing can be reconciled, such interpretation shall be put upon it, as may make them agree, because every body shall be supposed to swear the truth, and no man shall be intended to swear a manifest perjury; therefore that construction shall be taken that would make them agree, rather than such whereby they must necessarily oppose each other.

One affirmative witness countervails the proof of several negative, because the affirmative may swear true, and the negative also; for the negatives may commonly be, that they know not of the matter; the affirmative swears that it is, and so the affirmative may be true, and the negative also; for the thing that the one swears may be true, though the other knew nothing of the matter; but where the affirmative and negative oppose each other in contradictory propositions, the evidence is to be weighed according to the rules hereafter mentioned.

If there be two witnesses against two, and therefore no preponderating as to their number, they are to be weighed as to their credit.

If a witness be produced, and another be produced as to his credit, his credit is lessened in proportion to the credit of the opposite witness.

If a witneſs be produced, and another be produced in deſtruction of his credit, and a third be produced to ſupport the credit of the firſt witneſs, his credit is to be ſupported in proportion to his own credit, and that of the third witneſs to the ſecond.

The credit of a witneſs is to be judged of, from his ſtate and dignity in the world, for men of good circumſtances are ſuppoſed not to be ſo eaſily induced to commit a manifeſt perjury, as thoſe in a penurious ſituation. Their credit is alſo to be taken from their principles, for men atheiſtical, and looſe with regard to oaths, are not of the ſame credit as men of good morals and pure converſation.

Their credit is likewiſe to be eſtimated from their perfect indifference to the point in queſtion; for we rather ſuppoſe that, favor and regard to a relation, may draw a man into perjury, than that one wholly indifferent and unconcerned ſhould be guilty of the crime.

If witneſſes are equal in number and credit, their diſcernment muſt ariſe from their ſkill, and will appear from the reaſons and accounts they give of their knowledge; for if one gives more plain and evident marks and ſigns of his knowledge than the other, he is rather to find credit; for the memory on the other ſide ſeems more defective, and therefore they appear raſher than the others in taking upon them the knowledge and remembrance of the things concerning which they depoſe, at leaſt they do not appear ſo diſtinguiſhing in their obſervations, as thoſe who give the marks and ſigns of their memory.

Formerly,

Vide ante. 2 Hawk. P. C. 434. Cro. Car. 292. 2 Bulſt. 147. H. P. C. 264. Q. 3. Inſt. 79.

Formerly, as before obſerved, in caſes of treaſon or felony, no witneſſes were ſworn againſt the King; and the reaſon ſeemed to be, becauſe men thought it an act of piety to ſave the life of a man, and therefore might ſtretch a little beyond their knowledge, and for that reaſon were not admitted to hurt their conſciences by ſwearing; and therefore it ſeemed hard to make any uſe of this rule of law to depreciate their affirmation, as if of leſs value than an oath; for the party affirming declared he was willing to take his oath, and could not be admitted*; ſo no advantage ſhould be taken of the authority of an oath above that of a naked affirmation, for that were to turn the rules of law into oppreſſion and injury: where there was only judgment of member, there witneſſes were to be admitted againſt the king, becauſe the reaſon of the rule did not extend to ſuch caſes. But now by ſtatute law, in caſes of treaſon and felony, the witneſſes againſt the King are admitted to their oaths, becauſe this rule was abuſed in the late reigns, to derive a credibility on the King's witneſſes, as being upon oath, though contradicted by men of better credit, upon their words only.

* Vide infra.

1 Sid. 211.

7 W. III. c. 3. & 1 Ann. ſt. 2. c. 9.

(p.) *Of* Presumptions.

Preſumption, what. G. L. E. 159.

We now think it neceſſary to ſay ſomething more of *preſumptions*; they are, as defined by the civilians, *Conjectura ex certo ſigno proveniens quæ alio adducto pro veritate habetur.* When the *fact* itſelf cannot be proved, that which comes neareſt to the proof of the *fact* is the proof of the *circumſtances* that neceſſarily and uſually attend ſuch

ſuch facts, and theſe are called *preſumptions*, and not *proofs*; for they ſtand inſtead of the proofs of a fact 'till the contrary be proved.

Theſe *preſumptions* are twofold, *violent*, or only *probable*; for light and raſh preſumptions weigh nothing, and therefore they need not be taken into conſideration. 1 Inſt. 6. b. 2 Hawk. P. C 438.

Of violent preſumption, and that is, when circumſtances are proved that do neceſſarily attend the fact. As if a man be found ſuddenly dead in a room, and another be found running out in haſte, with a bloody ſword. This is a violent preſumption that he is the murderer, for the blood, the weapon, and the haſty flight, are all the neceſſary concomitants to ſuch horrid facts, and the next proof to the ſight of the fact itſelf, is the proof of thoſe circumſtances that do neceſſarily attend ſuch fact. If a man gives a receipt for the laſt rent, the former is preſumed to be paid, becauſe a man is ſuppoſed firſt to receive, and get in the debts of the longeſt ſtanding. But the proof is much ſtronger if the receipt be in full of all demands, for then it is plain, there were no debts ſtanding out; and if this be under hand and ſeal, the preſumption is ſo violent, that the law admits of no proof to the contrary; becauſe that were to let a man invalidate his own deed, which our law doth not permit; for here, though the payment of the money is not proved, yet the acquittance is proved, which could not be without ſuch payment. Every preſumption is more or leſs violent in proportion as the ſeveral circumſtances ſworn to, do uſually, more or leſs, accompany the fact to be proved. If there Co. Lit. 6. G. L. E. 161.

be an old deed, and poſſeſſion has always gone along with that deed, it is a violent preſumption of a right, although livery be not actually proved; for notwithſtanding the fact of livery is not proved, yet the circumſtances uſually attending ſuch a fact are really proved, that is, the old deed, and the conſequent poſſeſſion.

With reſpect to *probable preſumptions*, every caſe muſt ſtand upon its own circumſtances, and it would be an endleſs labor to enlarge upon the ſubject; but various caſes will be found in the courſe of the work, ſerving for examples.

[A.] OF WRITTEN EVIDENCE.

This is twofold.

I. PUBLIC.

II. PRIVATE.

I. PUBLIC, which is twofold.

(I.) RECORDS.

(II.) WRITINGS not OF RECORD.

(I.) RECORDS are

[1.] *Acts of parliament*, and they are *public* or *general*, and *private* or *particular*.

[2.] *Other Records, &c. of various kinds.*

[3.] *Common Recoveries to bar entail.*

[4.] *Judgments*, as *verdicts*, *nonſuits*, *&c.*

[5.] *Writs.*

(II.) PUBLIC WRITINGS not OF RECORD, are

[1.] *Decrees in Chancery.*

[2.] *Bills in Chancery.*

[3.] *Anſwers.*

[4.] *Depoſitions.*

[5.] *Affidavits* in *Equity* and *Law.*

[6.] *Proceedings* in the *Spiritual* and other *Courts.*

[7.] *Rolls* of *Courts-Baron, &c.*

[8.] *Regiſters, &c.*

[9.] The *Pope's Licence* and *Bull.*

[10.] PUBLIC BOOKS, &c. ſuch as *Domeſday Book*—Books in the *Herald's* Office—The *Navy* and other *Public Offices* - *Surveys* —*Terriers*—*General Hiſtory*—and *Inventories, &c.* taken by *Sheriffs.*

II. PRIVATE WRITTEN EVIDENCE. This is twofold.

(I.) WRITINGS UNDER SEAL.

(II.) WRITINGS without SEAL.

(I.) WRITINGS UNDER SEAL, are *Charters* and *Deeds* between party and party; *Deeds Poll, Obligations,* and *Bills Penal, &c.*

(II.) WRITINGS without SEAL, are

[1.] *Wills.*

[2.] *Policies of Inſurance.*

[3.] *Bills of Exchange.*

[4.] *Promiſſory Notes.*

[5.] *Other Writings* without *Seal of various kinds*

[A.] I. (1.) OF WRITTEN PUBLIC EVIDENCE.

I. OF RECORDS.

[1.] *Acts of Parliament.*

They are *public* or *general,* and *private* or *particular.*

[2.] *Other Records, &c. of various kinds.*

[3.] *Common Recoveries to bar entails.*

[4.] *Judgments,* as *Verdicts, Nonsuits, &c.*

[5.] *Writs.*

GENERAL OBSERVATIONS.

Before we enter into consideration of the several kinds of records, it may be proper to say something of the *nature* of records, and of *copies* being evidence.

G. L. E. 7. *Records* are the memorials of the legislature, and of the King's courts of justice, and are authentic beyond all manner of contradiction; they are (if a man may be permitted a simile from another science) the proper *diagrams* for the demonstration of right, and they do constantly preserve the memory of the matter, that it is ever permanent and obvious to the view, and to be seen at any time in all the certainty of demonstration; in as much as the record can never be proved *per notiora,* for demonstration is only appealing to a man's own conceptions, which can never be done with more conviction, than where you draw the consequence from what is already a *concessum;* and, consequently, there

there cannot be any greater demonstration in a court of justice than to appeal to its own transactions.

But *records* being the precedents of the demonstration of justice, to which every man has a common right to have recourse, cannot be transferred from place to place, to serve a private purpose, and therefore they have a common repository, which is in the Treasury at *Westminster*, from whence they ought not to be removed but by the authority of some other court; and this rule of law is plainly agreeable to reason and justice: for if one man might demand a record to serve his own purpose, by the same reason any other person might demand it, but both could not possibly have it at the same time in different places, and therefore it must be kept in one certain place, in common for them both; besides, these records, by being daily removed, would be in great danger of being lost, and consequently it is on all hands convenient that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence but by public authority from superior justice.

Therefore the copies of records must be allowed in evidence, for since you cannot have the original, the best evidence that can be had of them is a true copy; and the rule of evidence requires no farther than to produce the best of which the nature of the thing is capable; for to tie men up to the original, which is fixed in one certain place, and cannot be had, is totally to discard their evidence; but it were very hard and injurious to prevent the best and most authentic testimony from being evidence, because it is so 10 Co. 92, 93.

guarded and confined by the law that it cannot itſelf be had or produced; if that were ſo, then the rules of law and right would be the authors of injury, which is the higheſt abſurdity; for in many caſes, juſtice muſt fail without proof from the records, when themſelves cannot be had at the trial.

2 Bac. Ab. 308. Skin. 174. 584.

But a copy of a copy is not evidence; for the rule demands the beſt evidence of which the nature of the thing admits; and a copy of a copy cannot be the beſt evidence, for the farther off a thing lies from the firſt original truth, ſo much the weaker muſt the evidence be; and therefore a true copy muſt be given in evidence, which reduces it to its firſt and beſt certainty: beſides, where you would give the copy of a copy in evidence, there muſt be a chaſm or gap in your evidence, for if you have the firſt copy, and by oath or otherwiſe prove *that* a true copy, then the ſecond copy is altogether idle and inſignificant; if you have only the ſecond copy, then it cannot appear that the firſt was a true copy, becauſe it is not there to be ſworn to, and conſequently it is not *proved* in court, and then it is not evidence, and of courſe the tranſcript of that which is not in itſelf evidence, cannot be given in evidence. *Vide* farther *infra*.

[1.] (*a.*) *Of the* FIRST *sort of* RECORDS, *viz.* ACTS OF PARLIAMENT.

THESE are the memorials of the legislature, and therefore of the highest and most absolute proof; and they either relate to the kingdom in general, and then are called *general* acts of parliament, or only to the concerns of private persons, and are thence called *private* acts. A *general* act of parliament is taken notice of by the judges or jury without being pleaded; but a *particular* act of parliament is not taken notice of by the court, without being pleaded; for the court cannot judge of particular laws, which do not concern the whole kingdom, unless that law be exhibited to the court; for they are obliged by their oaths to judge all matters coming before them *secundum leges et consuetudines Angliæ*, and therefore they cannot be obliged *ex officio* to take notice of a particular law, because it is not *Lex Angliæ*, a law relating to the whole kingdom, therefore, like all other private matters, it must be brought before them to judge thereon.

G. L. E. 10. B. N. P. 222.

G. L. E. 41. Hob. 227. 4 Co. 76. a. Noy. 124. Doct. placit. 336. Plowd. 65 a 84. a. Hob. 227. Cro. Ja. 112. 5 Co. 2.

But a *private* act of parliament, or any other private record, may be brought before the jury if it relate to the issue in question, though it be not pleaded, for the jury are to find the truth of the fact in question, according to the evidence laid before them; and therefore if the private act brought before them doth evince the truth of the matter in question, it is as proper evidence to the purpose, as any record or evidence whatsoever.

Hob. 227. Cro. Jac. 112.

Hob. 227. Since ſuch records are authentic, it is the propereſt ſort of evidence: there was an antient error on this ſubject, founded upon a notion that the jury could not find an act of parliament, or other matter of record, which is falſe, for the *allegata* to the jury, ſays *Hobart*, is every thing that may be offered in evidence relating to the iſſue. As if the iſſue were, whether ſuch lands were within certain letters patent granted by King *H.* 8. the defendant may ſhew the ſtat. 35 *H.* 8. which enacts, that lands ſhould paſs, notwithſtanding any mis-recital, and that by this means, notwithſtanding the mis-recital, the lands were within the grant; for though this be a private ſtatute, yet ſince it relates to the iſſue, it may, like all other matters, be given in evidence, for the ſtat. is produced to prove, that notwithſtanding the mis-recital, the lands might be compriſed in the grant.

Hob. 227. Lucet. Dy. 129. B. al. Contr.

Dy. 129. Hob. 227. On an *attaint* a particular act of parliament cannot be given in evidence that was not given in evidence to the petit jury, for ſince on the attaint, the former verdict is called in queſtion, and the jury puniſhed for the iniquity of that verdict, it follows of courſe that no more evidence can be given than was offered to the petit jury; for they could not form any judgment but upon the evidence offered, and therefore ought not to be called in queſtion upon different evidence.

Hob. 227. But a general ſtatute may be offered in evidence to the grand jury in an attaint, though it was not offered in evidence to the petit jury, becauſe of a general law, every perſon who lives under it, is ſuppoſed to take notice, and conſequently the firſt

jury

jury on the decision, were obliged to understand it; otherwise they ought to have referred it back to the decision of the court; for when a jury take upon them to judge of the whole matter, they at their peril do take upon themselves the understanding of the law; and if the petit jury have judged without being apprised of the general law of the kingdom, as they ought to be, yet, that may, nevertheless, be offered to the grand jury, who may be made sensible of such general law, on which their judgments must be founded.

The distinction between a general and a particular law is; whatever concerns the kingdom in general, as before observed, is a general law, and whatever concerns a particular species of men, or some individuals, is a special or particular law, and must be pleaded. B. N. P. 223. 4 Co. 76. Holland's case.

From this definition it is plain, that the same law may be both general and particular in different parts; *ex. gr.* 3 *Jac.* 1. against recusants in general, in disabling them to present; yet the clause giving their presentations to the universities is particular, and must be pleaded or found. Hob. 227.

A law which concerns the King is a general law, because the head and union of the whole commonwealth. 4 Co. 76. Doct. placit. 339.

A law that concerns all lords is a general law, because it concerns the property of the kingdom, it being all holden under lords, either mediate or immediate. But a law that only concerns the nobility or lords temporal, is a particular law, because it relates to no more than one set of persons, as if a law 4 Co. 76. b. Doct. placit. 337. 10 Ed. 4. 7. a. 52 H. 3. c. 3. 2 Inst. 105. 4 Co. 76. b. Doct. placit. 338. 13 Ed. 4. 8. b.

a law makes them liable to ſuch or ſuch proceſs.

B. N. P. 223. Yet, perhaps, if a law related to the body of the peerage, it would be deemed a general law, for as ſuch they are part of the legiſlature; and what relates to the conſtitution, is a general law.

4 Co. 76. a. Doct. placit. 337. That which relates to all officers in general, is a general law, becauſe it concerns the univerſal adminiſtration of juſtice, as the ſtat. of *Weſt.* 1. 3 *Ed.* 1. *cap.* 26. that no ſheriff or other officer ſhould take a reward for his office.

4 Co. 76. Doct. placit. 337. Dy. 119. But if it relates only to particular officers, and not to the adminiſtration of juſtice, it is a particular law.

4 Co. 76. 5 Co. 2. What relates to all ſpiritual perſons, is a general law, in as much as the religion of the kingdom is the general concern of the whole kingdom, *ex. gr.* the 21 *H.* 8. 13 *El. c.* 10. 18 *El. c.* 11. But what relates to one ſet of ſpiritual perſons, is particular, as the act of the 1 *El. c.* 19. of Biſhops leaſes.

4 Co. 76. b. An act that comprehends all trades, is general, becauſe it relates to traffick in general; but an act that relates only to grocers or butchers, &c. is particular.

4 Co. 76. Let the matter of a law be as ſpecial as it may, yet, if it relates equally to all, it is a general law; but a law relating to ſome counties or pariſhes, is ſpecial.

B. N. P. 224. Saxby v. Kirkus, H. 27. G. 2. K. B. Though it be regularly true, that a private law ſhall not be taken notice of, unleſs it be ſhewn, yet it will be otherwiſe in caſe ſuch private law be recognized by a public one. *Ex. gr.* the 23 *H.* 6. *c.* 9. relative to ſheriffs

ſheriffs bonds, is a private law*, yet 4 *Ann. c.* 116. § 20. having enabled the ſheriff to aſſign ſuch bond, the court muſt take notice of the law that enables him to take ſuch bond.

* Query, De hoc? B. R. ſeemed to think otherwiſe in Samuel and Evans.

This doctrine is now fully eſtabliſhed in the caſe of *Samuel*, aſſignee, *v. Evans*, v. poſt C. 1. [1.]

T. 28. G. 3. Vide poſt C. I. [1.]

(b.) Where both public and private ſtatutes muſt be pleaded.

There are ſome caſes in which both *public* and *private* ſtatutes ought to be pleaded; and that is when they make void any legal ſolemnities; for in this caſe the conſtruction of the law is, not that ſolemn contracts ſhall be deemed perfect nullities, but that they are voidable by the parties prejudiced by ſuch contracts; and one reaſon of the conſtruction ariſeth from this rule of expounding all ſtatutes, that *Quiſquis poteſt renuntiare Juri pro ſe introducto*—where any perſon has benefit by a law, he may renounce that benefit if he will, and refuſe to take any advantage of it; but if theſe acts were conſtrued perfect nullities, that rule muſt be laid aſide, and the party muſt receive benefit by the law, whether he will or not; and therefore ſuch acts of parliament muſt be pleaded, that the party may appear to take the benefit of them.

Vinnius 32. 21. in Juſtinian.

Another reaſon of this conſtruction is, that as what ſhall conſtitute the ſolemnities of a contract is matter of law, ſo it is matter of law how theſe ſolemnities ought to be defeated and deſtroyed; and in as much as it is matter of law by what ſolemnities a con-

tract

tract is to be constituted, therefore, when an action is to be founded upon any solemn contract, that contract ought to be offered to the court; now it would be preposterous for the law to require that the contract should be offered to the court, that it may appear to be legally made; and yet that it should not require it to be offered to the court, that it may appear how it is defeated; both certainly must be determined by the same judicature, for it is absurd to say that the court should determine that the contract was lawfully made, and that the jury should determine that it was lawfully defeated: It is for this reason, that you cannot give the act of Queen *Eliz.* touching *usurious* contracts in evidence on the general issue, though a general law; but it ought to be pleaded.

5 Co. 119. Hob. 72. 166. Vide 3 Co. 59, 60.

So the 23 *H.* 6. *c.* 9. of sheriffs bonds cannot be given in evidence on the general issue, but it ought to be avoided by pleading.

Whelpdale's case. 5 Co. 119. Hob. 72. 166. Vide 1 Mod. 57.

Since 4 Ann. c. 16. § 20. *the condition appears upon the record, and advantage may be taken in arrest of judgment, after verdict upon* non est factum.

Samuel assignee, v. Evans. B. R. T. 28. G. 3. Vide post. C. I. [1.]

So a fine is made void by the statute of *Westminster* 2. 13 *Ed.* 1. *c.* 1. but construed only to be voidable. And a recovery by a wife with a second husband made void by 11 *H.* 7. *c.* 20. but construed only voidable.

2 Inst. 336. 3 Co. 59, 60.

If an action or information be brought on a penal statute, and there is *another* statute that discharges or exempts the defendant from the penalty, this ought to be pleaded, and cannot be given in evidence on the general issue; for the general issue is but a

B. N. P. 225. 2 Rol. Ab. 683. G. L. E. 11.

denial of the plaintiff's declaration, and the plaintiff has proved the defendant guilty, when he hath proved him within the law upon which he hath founded his declaration, so that the plaintiff hath performed what he hath undertaken; but if the defendant would exempt himself from the plaintiff's charge, he should not deny the declaration, but shew the law which discharges him.

But if there is any thing in the *same* statute on which the action, &c. is founded which discharges or exempts the defendant, it may be given in evidence, if by *another* statute it must be pleaded. *Per Hale, ch. Baron.* Hammond qui tam v. Taylor, Hard. 231.

Another difference is taken between where the saving proviso in a statute is matter of fact, and where it is matter of law; for when it is meer matter of fact, it may be given in evidence; as if an action of debt be brought against a spiritual person for taking a farm, the defendant pleads *Quod non habuit nec tenuit ad Firmam contra formam Statuti.* Upon this issue joined, the defendant may give in evidence, that it was for the maintenance of his house, according to the proviso of the statute, for this is not against the statute. 2 Rol. Ab. 683.

But upon an information on 5 *E.* 6. *c.* 14. against ingrossing, the defendant on the general issue, cannot give in evidence a licence of three justices of peace, according to the proviso in the statute, because whether there be a sufficient authority given, is matter of law, and therefore ought to be pleaded, and cannot be given in evidence. *Vide supra.* 2 Rol. Ab. 683.

A saving proviso may be given in evidence on the general issue, because if the party 1 Jones 320. 2 Rol. Ab. 683. pl. 15.

party be within the proviso, he is not guilty on the body of the act upon which the action is founded.

(c.) *Farther as to what is evidence of acts of parliament.*

G. L. E. 10. Tri. per pais 232. v. 1. Stra. 446. B. N. P. 225.

Of general acts of parliament the printed statute book is evidence; not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already.

B. N. P. 225.

But in private acts of parliament the printed statute book is not evidence, though reduced into the same volume with the general statutes; but the party ought to have a copy compared with the parliament roll; for private statutes do not concern the kingdom in general, and therefore no man is understood to be possessed of them, as they are of those general laws which are set up as the regulation of their own actions, and consequently the private statutes are no intimation to what is already known, but they are the rules that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same precision as the copies of all other records, for they are not considered as already lodged in the minds of the people.

Ca. K. B. 216.

However, a private act of parliament in print that concerns a whole country, as the act

act of *Bedford* levels, for rebuilding *Tiverton*, *&c.* may be given in evidence without comparing it with the record. And these things are the rather admitted, because they gain some authority from being printed by the King's printer; and, besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. And for this reason printed copies of other things of as public a nature have been admitted in evidence without being compared with the original: as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. *Sed qu.* and if evidence, whether it should not be proved to have been printed by the King's printer?

Goodright v. Skinner, M. 7. G. 2. C. B. B. N. p. 226.

Ca. K. B. 216.

(d.) *General rules concerning actions upon penal statutes.*

By 31 *El. c.* 5. it is enacted, that all actions, *&c.* brought for any forfeiture upon any penal statute made or to be made, whereby the forfeiture is limited to the King, shall be brought within two years: and all actions upon any penal statute, the benefit whereof is limited to the King and to the prosecutor, shall be brought within one year.

B. N. p. 194.

And in default of such pursuit, then the same to be brought for the King at any time within two years after that year ended. And if any suit upon any penal statute made or to be made, except the statute of *tillage*, shall be brought after the time in that behalf before limited, the same shall be void and of none effect.

Upon this ſtatute it hath been holden,

4 Mod. 144. 1 Show. 353. 1. That if any offence prohibited by any penal ſtatute be alſo an offence at common law, the proſecution of it as an offence at common law is not reſtrained by this act.

Noy. 71. 2. That the defendant may take advantage of this ſtatute on the general iſſue, and need not plead it.

Carth. 232. Ld. Raym. 78 3. That the party grieved is not within this ſtatute, but may ſue as before: but *quære*, where the ſuit is firſt given to the party grieved, and then to the common informer?

Lookup who, &c. v. Sir T. Frederick, Mic. 6 G. 3. On a caſe reſerved it appeared that an action of debt was brought on 9 *An. c.* 14. by a common informer againſt Sir *T. F.* for winning 525 *l.* of *G. L.* at cards. The money was loſt and paid 11 *March*, 1757, and the original not ſued out till *Michaelmas*, 1762. The court of *C. B.* held it a caſe within 31 *El.* though the action given in the firſt inſtance to the party grieved, and afterward to the common informer, for himſelf and the poor of the pariſh: for ſuch action would have been within the *ſt.* 7 *H.* 8. and 31 *El.* was made to narrow the time given by that ſtatute, and therefore could never mean to leave any actions unreſtrained in time; the latter part of the clauſe muſt therefore be conſtrued to extend to them.

Carth. 232. It has been determined that ſuing out a *latitat* within the year, is a ſufficient commencement of the ſuit to ſave the limitation of time: but if the writ was not ſued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonſuited.

Morris and Harwood, Mic. 3 G. 3.

If two actions are commenced upon a penal ſtatute, founded upon proceſs teſted the ſame day, and one action pleaded in abatement of the other, the real day of ſuing forth each proceſs (though out of term) may be ſhewn in pleading. Combe v. Pitt, 3 Burr. 1423.

By 21 *Jac.* 1. *c.* 4. all offences againſt penal ſtatutes, for which any common informer may ground an action, *&c.* before juſtices of aſſize, *&c.* (except offences concerning recuſancy or maintenance of the King's cuſtoms, or tranſporting gold and ſilver, ammunition or wool, *&c.*) ſhall be commenced, ſued, tried, recovered and determined by action, *&c.* before the juſtices of aſſize, *&c.* or before juſtices of the county, *&c.* and the like proceſs in every popular action, *&c.* ſhall be, as in actions of treſpaſs, *vi et armis* at common law, and in all ſuits on penal ſtatutes, the offence ſhall be laid in the proper county; and if on the general iſſue the offence be not proved in the ſame county, in which it is laid, the defendant ſhall be found Not Guilty.

In the conſtruction of this act it has been holden, that it does not extend to any offence created ſince that ſtatute, but that where a ſubſequent ſtatute gives an action of debt or other remedy for the recovery of a penalty in any court of record generally, it ſo far impliedly repeals 21 *Jac.* 1. However, the offence muſt be laid within the proper county. Hick's Caſe, Salk. 372.

This ſtatute gives no new juriſdiction to the courts therein mentioned; therefore ſuits for ſuch offences, over which they had not any juriſdiction before the ſtatute, muſt be brought in the courts of *Weſtminſter*.

Where by the act creating the penalty, it is to be recovered by bill, plaint, or informa- Carth. 465.

tion in any of the King's courts of record, and no mention made of the quarter sessions or assizes, the 21 *Jac.* 1. does not extend to it; for the act never meant to give a jurisdiction to the quarter sessions or assizes where they had none before.

Stra. 703. Therefore it was holden that an information did not lie at the assizes for non-residence, the penalty (by 21 *H.* 8.) being recoverable by bill, plaint, or information in the King's courts.

In the case of the *K.* v. *Martel*, *M.* 25. *Car.* 2. in an information on the 5 *Eliz.* it was holden, that it lay not originally in *K. B.* because the 21 *Jac.* 1. hath negative words, but that if it be began originally below, the party may remove it by *certiorari* if he will, and give jurisdiction to that court, for it is a statute for the ease of the subject; but the King cannot remove it.

2 Show. 354. No suit by a party grieved is within the restraint of the statute.

By 18 *Eliz.* *c.* 5. no informer shall compound or agree with any that shall offend against any penal statute for an offence committed, but after answer made in court to the suit, nor after answer but by consent of the court. This extends only to common informers.

Hut. 35. It extends as well to subsequent penal statutes, as to those which were in being when it was made.

Maggs and Ellis, M. 25. G. 2. B. N. p. 196. By that statute the common informer must sue in proper person, or by his attorney: therefore an infant cannot be a common informer, for he must sue by guardian.

Cunningham v. Bennet, Tr. 1 G. 1. C. B. A common informer cannot sue for a less penalty than the statute gives; if he do,

though he have a verdict, judgment will be arrested. *Ex. gr.* If a common informer were to sue for the single value of money won at play, where 9 *An.* *c.* 14. gives the treble value.

In an action on a penal statute, it was moved by the defendant that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion, for the statute having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security. Query, If the court would suffer the action to proceed? Shinler v. Roberts, E. 12 G. 2. C. B.

The court will, on motion, give the defendant liberty to pay the penalty into court, with costs. Walker and King, Tr. 31. G. 2.

Wherever the action is founded on a penal statute, Not guilty, or *Nil debet*, are good pleas. Hob. 218.

If a defendant would plead a recovery in another action for the same offence in bar, he must take care to set out in his plea, that the plaintiff in the other action had *priority* of suit; if he do not, his plea on demurrer will be bad; but the record of a recovery in another action cannot be given in evidence on *Nil debet*: for if it be pleaded, the plaintiff might reply *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he cannot be prepared to shew on the general issue. Jackson and Gilbirg, Tr. 15. G. 2. Stra. 701. oct. Stra. 137. 4 H. 7. c. 20.

The proviso in the *Oxford* act, 16 and 17 *Car.* 2. *c.* 8. that that act shall not extend to any action, or information, on any penal statute, must be understood of popular actions Sewel v. Edmonton hundred, E. 7 G. 2. C. B.

 and

and informations, and not of remedies given by ſtatute to the parties grieved.

Stra. 1085. The act of 24 *G.* 2. *c.* 18. (reciting that by the 4 and 5 *Ann.* it was enacted, that every *venire facias* ſhould be awarded out of the body of the county, with a proviſo, that it ſhould not extend to any action or information upon any penal ſtatute, and that the proviſo had been found inconvenient, enacts, that every *venire facias* for the trial of any iſſue in any action or information upon any penal ſtatutes, ſhall be awarded of the body of the proper county, where ſuch iſſue is triable.

B. N. P. 197. If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and ſuch recovery be found to be fraudulent, the defendant is liable to two years impriſonment, by 4 *H.* 7. *c.* 20.

(e.) *When a ſtatute ſhall be* recited.

Lut. 1548. If an action lies for an offence at common law, and a ſtatute is made againſt the ſame offence, if the action is brought upon the ſtatute, it muſt be recited; otherwiſe it does not appear whether the action be upon the ſtatute, or at common law.

Lut. 1548. 2 Inſt. 200. As in an action upon the ſtat. *W.* 1. 3 *Ed.* 1. *c.* 20. *de malefactoribus in parcis.*

Lut. 1548. In an action upon the ſtat. 5 *R.* 2. and 8 *H.* 6. for a forcible entry or detainer.

So, if a ſtatute make a new offence, which was not ſo by the common-law, the ſtatute

Reg. 73. Lut. 1548. muſt be recited. As, in *waſt* againſt tenant for life or years.

(f.) When

(*f.*) *When a ſtatute need* not *be* recited.

But if a ſtatute extend a remedy, which was at common law in ſome particulars, it need not be recited. Dy. 83. b. 85. a, b.

As in *waſt* againſt a *tenant* in *dower* or *guardian*, the ſtatute need not be recited, for there was a prohibition of *waſt* againſt them at common law. Reg. 73. 1 Lut. 1548.

So in *debt* by an *executor*, or *adminiſtrator de bonis aſportatis*, *&c.* the ſtatute is not recited, for *debt* lay at common law in other caſes. Lut. 1548.

So in an action upon the *St.* 2 *R.* 2. 5. *de ſcandalis magnatum*, the ſtatute need not be recited. R. 2 Mod. 99.

In an *aſſiſe* for *tithes*, the *St.* 32 *H.* 8. 7. need not be recited. Dy. 85. a. b.

So the title, or preamble, need not be mentioned. Mod. Ca. 62. Sal. 609.

So where a ſtatute gives a writ, and ordains the certain form of the writ, the ſtatute need not be recited. Bro. Parl. 75. Lut. 1548.

So if the action be not founded upon a ſtatute directly, but upon a collateral fact, the ſtatute need not be recited: as in a *quare impedit* by the King upon a ſimoniacal contract, the *St.* 21 *Eliz.* 6. need not be recited. Lut. 1093.

When a ſtatute need not be recited, it is ſufficient if the plaintiff in his declaration ſhews his caſe to be within the purview of the ſtatute, and concludes *contra formam ſtatuti*. Semb. Lut. 202, 208, 212. 1 Sal. 212.

If he mis-recite the beginning of the ſtatute, and conclude *contra formam ſtatuti* generally, it will be good. Semb. Cro. Car. 232.

 If

Lut. 212. If it be founded upon ſeveral ſtatutes, *contra formam ſtatuti*, it is bad.

R. Yel. 116. So, *contra formam ſtatutorum*, where it is founded only upon one.

Yel. 116. But where an offence is prohibited by ſeveral ſtatutes, if only one is the foundation of the action, and the others are explanatory, it is ſufficient to ſay, *contra formam ſtatuti*, as in an action againſt an hundred.

R. 3. Lev. 61. In an information for 20 *l. per menſem* for not going to church; for ſeveral ſtatutes require the reſorting to church, but the ſt. 23 *Eliz.* only gives the 20 *l. per menſem.*

R. 2. Bul. 26. If there be debt by an aſſignee for a debt to a bankrupt, *Vigore ſtatuti* is ſufficient.

1 Sal. 212. So, if a declaration conclude *contra formam ſtatuti*, where there is no ſtatute in the caſe, it will be ſurpluſage.

R. 1 Sal. 212. If a declaration concludes ſo, where there are ſeveral cauſes of action, and only part within a ſtatute, the words, *contra formam ſtatuti*, ſhall be applied only to that part.

(g.) How *a ſtatute ſhall be* recited.

1 Com. D. 250. If an act of parliament be recited or pleaded, the day, year, and place of making it muſt be ſhewn. *Sed qu. if the day is neceſſary?*

Semb. Cro. Car. 232. If the plea miſtake the day of the commencement, or concluſion of the parliament, it will be bad.

R. 1 Lev. 296. Though it be in a private act, and *nul tiel record* is not pleaded; for the court *ex officio* will take notice of the commencement, prorogation, and every ſeſſion of parliament, and

and consequently, (if they are mistaken) that there is no such act.

And, if the session was held by prorogation, the shortest and surest way of pleading is, *ad sessionem parliament. tent.* such a day and year, in such a place. 2 Cro. 111. Lut. 140. 1409.

For, if the parliament commenced *quinto Elizabethæ*, and was prorogued *ad octavium Eliz.* and then the act passed, if it be pleaded, *ad parliamentum tentum octavo Eliz.* it is bad. R. Pl. Com. 79. a. R. 2. Cro. 111. 139. Cont. Dy. 95. a.

So, where the parliament was summoned 23 *Jan.* 1 *Eliz.* and then prorogued to 25 *Jan.* if it be pleaded, that by a statute *in parliamento inchoat.* 23 *Jan. et tunc prorogat. usque* 25 *Jan. edit.* it is bad; for the parliament did not commence till 25 *Jan.* R. Dy. 203 a.

So, if it be pleaded, by a statute made 2 *Nov.* 2 & 3 *Ed.* 6. it is bad; for the same day cannot be in two years. *Why, therefore, mention the day? vide post.* R. M. 302.

So, if a statute be pleaded to have been made 29 *Eliz.* where the parliament commenced 28 *Eliz.* it will be bad. Or, at a session 18 *Feb.* 14 *Car.* where the prorogation was to 18 *Feb.* 15 *Car. Semb. Ray*, 191. R. 3. Lev. 33. R. 1. And. 295. Vide Lut. 1117.

So, if a declaration be upon a general statute, and conclude *contra formam statuti*, made 2 *H.* 8. where it was made in another reign, or in another year of the same king, it will be bad. Sav. 42.

It is sufficient that so much of a statute is recited, as concerns the matter in question; and therefore, if it be said, *inter alia enactatum fuit*, it is well. R. Pl. Com. 65. a.

If the party recite so much of a statute as makes for him, it is sufficient, though he omit R. Pl. Com. 105. a. R. 2 Cro. 139.

omit a *proviso*, or other clause, that makes against him.

R. Lut. 140. Vide supra. If, in the recital of a statute there be a material variance, it is bad; as if the *time* or *place* of the making of it be mistaken.

R. Cro. El. 96, 697. If it be recited in conjunctive words, where it is in disjunctive.

R. Mod. Ca. 62, 3. 2 Sal. 609. If the party recite the title of an act, and it be mis-recited, though the recital was not necessary.

R. 2 Cro. 133. So, if he recite the st. 5 *El.* of perjury, *quod quilibet, &c. admitteret et forisfaceret, &c. for amitteret.*

R. Cro. El. 697. 2 Bul. 47. 51. If in a recital of the stat. 8 *H.* 6. 9. if any feoffment or discontinuance thereof be made, *thereof*, be omitted. But a small or immaterial variance does not prejudice.

R. Cro. Car. 523. As if an act say, if a recovery be *in aliquibus Curiis*; and it is recited, *in aliquâ Curiâ*.

Lut. 140. So, where it is a material variance from a general statute, if the declaration conclude *contra formam statuti in hujusmodi casu edit*, and not *contra formam statuti prædict*, it is well.

R. 1 Brownl. 196. So, if the defendant justify by force of a general act, and conclude, *contra formam statuti 6 Eliz.* where it was *temp. Ed.* 6. it will be good.

Per Shute. Sav. 42. So, if the declaration mistake the day or year of the statute. *Sed qu. vide ante.*

R. 2 Cro. 139. So, if a statute misrecited in the commencement, &c. be admitted by the plea, &c. it shall not afterwards be assigned for error.

Wendham v. Palgrave, M. 6 G. Fort. 372. Str. 212. A mistake in the commencement of the parliament is cured by concluding *contra formam statuti in eo casu edit. et provis.*

Plea

Plea of an act of insolvency of 2 *G.* whereas the parliament began 1*st George*, held naught. Ibotsham v. Cook, M. 5 & 6 G. 2. Fort. 372.

Plea of an act of 8 & 9 *W.* bad; it must be of the 8*th year*, in which the session began. Nutt. v. Stedman, H. 8 G. 2. Fort. 372.

[2] *Of other* RECORDS, *&c. of various kinds* generally; and of *some writings* not *of record*, such as

Letters patent,
Judgments,
Grants,
Convictions,
Commissions,
Fines,
Recoveries generally,
Pope's Bull,
Exemplification of *Administration*,
The *King's Licence*,
Writs,
Copies of *Indictments*,
Condemnation in the *Admiralty Court*,
Copy of *Copyholder's Admittance*,
Institutions, *&c.*

RECORDS are twofold.
(A) *Under Seal*, and
(B) Not *under Seal*.
Those *under seal* are called *Exemplifications*, of which more hereafter.

PREVIOUS CONSIDERATIONS.

We shall *first* consider,
[1.] *What may be given in* evidence.
[2.] *What shall be sufficient* proof.
[3.] *What* proof *is* not *sufficient*.

(1.) *What*

(1.) *What may be* given *in* evidence.

3 Com. Dig. 279. *Letters patent* may be produced in evidence. A *fine* or *common recovery*. A *judgment*, *statute*, *recognizance*, or other matter of record.

Hard. 118. A judgment and recovery in *Wales*, in a *Quod ei deforceat*.

4 Inst. 209. *Letters patent* of land in a *county palatine* under the seal of the dutchy.

3 Com. D. 279. So, the *Pope's bull*.

And by 29 *Car.* 2. 8. a *grant* of *augmentation* to a vicarage, registered, examined, and attested by the bishop, *&c.* is a record.

Gibson v. M'Carty at the sittings after term in London. T. 9. G. 2. B. R. H. 311. But no record of a criminal conviction can be given in evidence in a civil suit, for it might have been on the evidence of a party interested in the civil suit.

Ibid. Therefore, if *A.* convicted of forging a note from *B.* to himself, sues for other notes from *B.* to his intestate, and reads a deposition of a dead witness to prove *B.*'s owning the notes in question, and the same witness has sworn to *B.*'s owning the forged note, yet the record of conviction for forgery cannot be read, but the forged note may, and the marks of forgery shewn.

Tooker v. D. Beaufort, H. 30. G. 2. 1 Burr. 146. A commission of inquiry under the Exchequer seal, and an inquisition taken thereon, is admissible; but it is not conclusive evidence of lands having been part of a priory, though the party to the suit was not a party under the commission.

(2.) *What*

(2.) *What shall be sufficient* proof.

If a *record* itself be produced, it shall be read without other proof. So *letters patent* under the great seal shall be read without other proof. So by the *st.* 3. (or 3 & 4) *Ed.* 6. 4 and 13 *El.* 6, patentees, and all claiming under them, may make title, *&c.* by shewing the *exemplification* or *constat* of the roll. 3 Com. Dig. 79.

And these statutes extend to all the King's patents which concern land, privilege, or other thing, granted to a subject, corporation, or any other. R. 5. Co. 53.

So the *chirograph* of a *fine* is sufficient, without other proof. Pl. Com. 409. b.

Or the *exemplification* of a *fine*. 3 Com. Dig. 280.

So the *exemplification* of a *common recovery* under seal is sufficient, without more. Ibid.

So an *exemplification* of a *recovery* in an inferior court of record, under the town seal, where the records are consumed. Hard. 120. per Hale. 1 Mod. 117.

So an *exemplification* of a *recovery* in *antient demesne*, being old, if the records are lost. R. 1. Mod. 117.

And, by the st. 27 *El.* 9. the *exemplification* of a *recovery* in *Wales*, or a *county palatine*, shall be of the same validity to all intents, as the original record.

So an *exemplification* of any *record*, under the great seal, or seal of the court, is sufficient. 10 Co. 93. a.

So an *exemplification* of a *record* in *Wales*, or a *county palatine*, under the seal of the court there. Semb. Hard. 120.

So

R. Hard. 118. So an *exemplification* of the *Pope's Bull*, under the seal of the bishop, shall be allowed.

Kempton v. Crofs. P. 8. G. 2. B. R. H. 108. An *exemplification* under the archbishop's seal of *administration*, with the will annexed, is good evidence, though it only recites the fact, and sets out the will in *hæc verba*.

Barnes 449. The *postea* in a former action produced by the associate, is sufficient to prove that such action was tried, and referred.

10 Co. 92. b. 2 Rol. 678. l. 45. So a *record* may be proved by a *copy*, examined with the original; for a rasure or interlineation shall not be presumed.

R. Hard. 119. Though it be a record in *Wales*, *&c.* it may be proved by an examined copy.

2 Cro. 455. Lut. 1549. 1 Mod. 117. So a copy of a *common recovery* is sufficient, without proving a tenant to the *præcipe*; for it shall be intended well suffered, if the contrary does not appear.

1 Vent. 257. Though it be a *recovery* of a *reversion*, if it be antient, and the possession accordingly; for a *surrender* shall be intended.

R. Hard. 323. 1 Sal. 285. So, if a record be lost, or consumed by fire, it may be proved by collateral evidence; as, in ejectment for a rectory to which a *recusant* presented, the record of conviction being burnt, may be proved by the *estreats* in the *Exchequer*.

R. Hard. 323. So, if *appropriation* or *not*, be the issue, the *King's licence* being lost, may be proved by other evidence; for it is not directly the point in issue.

R. Hard. 323. Al. 18. So, in *trover*, if a *fieri facias*, or *venditioni exponas*, *&c.* be lost.

1 Vent. 257. So a *recovery* in *antient demesne*, being lost, and the roll not found, may be proved by witnesses, where the possession has gone accordingly.

So

So a *record* may be explained by witnesses; as what manor, person, &c. was intended, where there are several of the same name. Pl. Com. 85. b.

An *officer* may be examined as to the *condition*, but not as to the *matter* of a *record*. Leighton v. Leighton, M. 6. G. Str. 210.

The *printed statutes* examined with the parliament roll. Rex. v. Jefferies, T. 7 G. Str. 446.

A copy of an *award*, the original being lost in a mail robbed. Robinson v. Davies, T. 8. G. Str. 526.

If two are indicted and acquitted, and *copy* of *indictment* granted to one only, the other may read it in evidence in an action for malicious prosecution. Jordan v. Lewis, M. 13 G. 2. Str. 1122.

If the acts of *condemnation* of a ship, in an admiralty court abroad, are lost at sea, *parol* evidence shall not be allowed of the *reasons* of condemnation, what was lost being only copy of evidence. Bliedstyn v. Sedgwick, T. 9. G. 2. B. R. H. 304.

If an original *note* is lost, and a copy offered in evidence, the court must first be satisfied of the genuineness of the original. Goodier v. Lake, M. 1737. 1 Atk. 446.

The copy of a *copyholder's admittance* of 30 years standing is evidence, though not signed by the steward. Dean of Ely v. Stewart, T. 1740. 2 Atkyns 44.

If the patron's name in an *institution* is left blank in the Bishop's register, *parol* evidence may be admitted to prove who was patron. *R.* on error from *Ireland*. Bp. Meath v. Ld. Belfield. P. 21. G. 2. 1 Wilf. 215.

(3.) *What is* not *sufficient proof.*

But, regularly, a *record* is of so high a nature, that it cannot be proved, but by the record itself, or an exemplification, or copy thereof. 10 Co. 92. b.

The

3 Com. Dig. 281. The whole record, which concerns the matter in question, ought to be produced.

Hard. 324. Evidence to prove a record, which is lost or consumed, ought to be full and cogent.

Hard. 120. And therefore, a *warrant* for a *diem clausit extremum*, and an *entry* in the *docket-book*, is not sufficient proof of such writ.

R. Hard. 325. So an *estreat* in the *Exchequer*, and an inquisition upon it, is no proof of a *conviction*, where the *estreat* supposes it at the same assises at which the presentment of *recusancy* was made; for by the st. 23 *El.* 1 & 29 *El.* 6. proclamation shall be at the assises, when indicted, for the defendant to render himself before the *next* assises, and therefore he cannot be convicted at the *same* assises.

3 Com. Di. 281. If a *recovery* of a *reversion* was suffered but 10 or 12 years past, a *surrender* to make a tenant to the *præcipe* ought to be proved.

R. 5. Mod. 211. So, if there be probable evidence of an estate for life *in esse* in another, as a lease or mortgage by him.

As to *verdicts*, *nonsuits*, *&c.* we shall treat of them hereafter.

G. L. E. 14. We now return to Exemplifications, and first those *under seal*; they are of better credit than any sworn copy; for the courts of justice that put their seals to the copy, are supposed more able to examine, and more exact and critical in their examinations than any other person is or can be, and besides, there is more credit to be given to their seal, than to the testimony of any private person; and therefore we are surer of a fair and perfect copy, when it comes attested under their seal,

ſeal, than if it was a copy ſworn to by any private perſon.

(A.) *Of Exemplifications: they are two-fold.*

[1.] *Under the broad-ſeal,*

OR

[2.] *Under the ſeal of the court.*

(1.) *Under the broad-ſeal*; ſuch exemplifications are of themſelves records of the greateſt validity, and to which the jury ought to give credit, under the penalty of an attaint, for there is more faith due to the ſolemn atteſtations of public authority, than to any other tranſaction whatever, and therefore a falſification in ſuch caſe is high-treaſon. 2 Sid. 146.

When a record is exemplified under the greal-ſeal, it muſt either be a record of the court of *Chancery*, or be ſent for into the *Chancery* by a *certiorari*, which court is the centre of all the courts, and from thence a copy is received under the atteſtation of the great-ſeal; for in the firſt diſtribution of the courts, the *Chancery* held the broad-ſeal, from whence the authority for all proceedings iſſued, and thoſe proceedings cannot be copied under the great ſeal, unleſs they come into the court where that ſeal is lodged. 3 Inſt. 173.

But if the exemplifications under the broad-ſeal are the higheſt evidence of which the nature of the thing is capable, then why are any proofs admitted but thoſe? ſince, according to the principal rule in relation to evidence, the higheſt evidence the nature of the thing is capable of, is required. Objection.

When

Anſwer. When we ſay the law requires the higheſt evidence of which the nature of the thing is capable, it is not to be underſtood that in every caſe there muſt be all that force and atteſtation that by any poſſibility might have been obtained to prove a fact, &c. and that nothing leſs than the higheſt aſſurance poſſible, ſhould be given in evidence to prove any matter in queſtion; to ſtrain the rule to that heighth, would be to create an endleſs charge and perplexity, for there are almoſt infinite degrees of probability, one below the other; and if nothing but matters of the higheſt aſſurance may be given in evidence, the way of illuſtration of right would be the moſt troubleſome and expenſive that can be imagined; as, for inſtance, no verbal contract could be proved, becauſe a written contract carries with it greater credibility, and conſequently an unwritten contract would not be the greateſt aſſurance of which the nature of the thing is capable; ſo a contract atteſted by two witneſſes gains more credit than a contract atteſted by one only; and, therefore, by the ſame reaſon the teſtimony of one witneſs would not be good proof of a contract; and all theſe are plainly as good reaſonings, as to ſay that the ſworn copy of a record ought not to be admitted, becauſe a copy under the broad ſeal is ſtronger evidence. But the true meaning of the rule of law, which requires the greateſt evidence whereof the nature of the thing is capable, is this, that no ſuch evidence ſhall be brought which *ex natura rei*, ſuppoſes ſtill greater evidence behind in the party's own poſſeſſion and power; for ſuch evidence is altogether inſufficient, and does not prove any thing, as it carries a preſumption with it, contrary

contrary to the intent for which it was produced; because, if the other greater evidence did not make against the party, why did he not produce it to the court? As if a man offers a copy of a deed or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, otherwise he would have produced it: and therefore the proof of a copy in this case is not evidence, and cannot possibly weigh any thing in a court of justice.

When a record is exemplified, the whole must be exemplified; for the construction must be taken from the view of the whole matter taken together. 3 Inst. 173.

(2.) The second sort of copies under seal, are *exemplifications under the seal of the court*, and these are of higher credit than a sworn copy, for the reasons formerly given.

These exemplifications, and all others under seal, shall be delivered to the jury to be taken with them, but sworn copies shall not *, the origin was in the court of *Chancery*. The invention of sealing was first introduced instead of coins; and from thence it began to be made use of by way of attestation; and, following the King's example, it began to be used in all the courts of justice for the attestation of their transactions; afterwards it was used by private lords of manors, for the authenticating of their grants, and for tickets instead of pieces of money; from hence impressions were devised with the distinction of arms * and of families; these were perfectly known in the neighbourhood, and therefore are always delivered to the view of the jury, and the jury are allowed to carry them away

2 Sid. 145. G. L. E. 17.

* Query, If not intitled to every thing given in evidence?

* As to arms, Vide 1 Sid. 353.

with them, as the acts of the most remarkable solemnity, that the most solemn acts may make the last impression.

Another reason why matters under seal shall be delivered to the jury is, because these things, that are generally of higher or at least of equal credit with matters sworn *viva voce*, would not yet be understood so well upon the hearing, as the evidence *viva voce* may upon the examination, where the jury have the liberty to put what question they please; and therefore matters under seal are carried away by the jury, to be inspected and considered, that things of greater credit may be equally understood, with other matters that carry less authority.

G. L. E. 19, 19. 2 Sid. 145.

But the *chirograph* of a *fine*, a sworn copy or any other writing, though it may be given in evidence, yet it shall not* be delivered to the jury, for these have no intrinsic credit in themselves, and the jury of themselves are not supposed to take notice of them, as they have not any credit, but what they derive from something else, *viz.* from the oath of the person who attests them, or from some presumption in their favor, so that they receive their credit from some act in court, but do not carry it along with them, and therefore cannot* be removed out of court, with the jury; but things *under seal* are supposed to have an intrinsic credit; from the impression of the signature, they are supposed to be known to the jury in some measure, and therefore are very conveniently lodged in their possession to discern of them; but as to writings that are *not* under seal, the jury can make no discernment of their own, but their credit must totally arise from

* Query as before? If this is law, yet counsel always consent, when the jury require it?

* They frequently are, by consent of counsel. After they have been duly proved, they deserve complete credit, and it may be oftentimes necessary for the jury to take them, and give them farther consideration, than they

from some act in court, and therefore they cannot be put in the power of the jury.

could in court, from hearing them read. The reasoning in the text is Gilbert's, and therefore it is preserved. Vide inf.

(a.) *Of* Seals *Public* and *Private.*

Here a distinction is to be made between seals of *public* and *seals of private* credit, for seals of *public* credit are full evidence in themselves, without any oath made; but seals of *private* credit are not evidence, without an oath concurring to their credibility: Seals of *public* credit are the seals of the King, and of his public courts of justice, time out of mind: these courts make a part of the law and constitution of the kingdom, and have their sanction in that immemorial usage, which is the foundation of the common law.

G. L. E. 19. 2 Sid. 146. Hard. 118, 119.

Now the seals of these courts are part of the constitution of the courts themselves, and consequently, the courts and the seals of these courts, are supposed to be known to every one, since they were equally intitled to that supposal, as any other custom or law whatsoever.

So the seal of a court created by act of parliament, is of full credit without further attestation, for an act of parliament is of the same notoriety with the common law, and therefore the court and the seals thereby created, are supposed universally known to every one. But the seals of private courts, or of private persons, are not full evidence by themselves, without an oath concurring to their credibility*, for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, *i. e.* by the oath of some that have knowledge of

2 Sid. 146.

Quære?

* Unless antient deeds, as before observed.

of them; for what is not of itſelf known, muſt be made known *aliunde*; and when theſe ſeals are thus atteſted, they ought to be delivered into the jury, becauſe, though part of their credit ariſes from the oath, that gives an account of their ſealing, yet another part of their credit ariſes from a diſtinction of their own impreſſion; for antiently every family had its own proper ſeal, as it is now in corporations: by this they diſtinguiſhed their manner of contracting one from the other, and by falſe impreſſions of the ſeals they diſcovered a counterfeit contract, and therefore it was not the oath, but the impreſſion of the ſeal accompanying it, that made up the complete credit of the inſtrument.

But ſince in private contracts, the diſtinction of ſealing is, in general, worn out of uſe, and men uſually ſeal with any impreſſion that comes to hand, to be ſure there muſt be evidence of *putting* the ſeal, becauſe at this day little can be diſcovered from the bare impreſſion; beſides, ſince the witneſſes names are inſerted in the contract, unleſs they appear to prove it, there is not the utmoſt evidence of which the nature of the thing is capable, for their not appearing is a preſumption that they never were privy to any ſuch tranſaction.

(*b*). Of

(b.) Of Delivering *Exemplifications* of *Depositions* in *Equity* to the *Jury*.

EXEMPLIFICATIONS of *depositions* in equity, ſhall be delivered to the jury, if the party be dead, and theſe exemplifications are under the great ſeal; and although the exemplification comprehends the teſtimony of ſome that are living, as well as of others that are dead, yet it ſhall be delivered to the jury, becauſe when the witneſſes are dead, their depoſitions are the greateſt evidence of which the nature of the thing is capable, and equal to evidence *viva voce*, therefore they ought to be as carefully conſidered and examined, as *viva voce* evidence, which cannot eaſily be done, unleſs the jury take them; for the bare reading of them in court is not likely to make the ſame impreſſion; beſides, this evidence does not derive any credibility from any act of the *niſi prius* court, but they have it intrinſically in themſelves, from the ſelf-evidence of their own ſeals; and therefore, wherever they are removed, they remain the ſame; but if ſome of the witneſſes are living, it is not the higheſt evidence. 2 Rol. Ab. 687. Styl. Pr. Regr. 294. 2 Stra. 920.

(B.) Another ſort of *copies* are thoſe that are *not* under ſeal, and theſe are of two ſorts,

[1.] Sworn *Copies*, and
[2.] Office *Copies*.

[1]. *Of* ſworn *copies*. Theſe muſt be of the records brought into court in parchment, and not of a judgment in paper, ſigned by the

 maſter,

master, though upon such judgment you may take out execution; for it does not become a permanent matter, until it be delivered into court, and there fixed as *memorandums* or rolls of that court; and until it be a roll of that court it is transferrable any where, and so doth not come under the reason of law, that permits us to give a *copy* in evidence.

1 Vent. 257. Styl. Pr. Reg 205. 1 Mod. 117. 1 Salk. 285. G. L. E. 20, 21. Where a record is lost, a copy of it may be read, without swearing it a true copy, for the record is in the custody of the law, and not of the party, and therefore if lost, there ought to be no injury arising to the party's private right, and consequently if it be lost, the copy must be admitted without swearing to any examination of it, since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination. Sed *Qu?* for when the copy was made, it might have been examined?

Carvin. Dig. 292. 1 Mod. 117. But in such cases as these, the instruments must be, according to the rules required by the civil law: *viz.* they must be *vetustate temporis aut judiciariâ cognitione roborata.*

1 Vent. 257. The copy of a *decree* of *tithes* in *London*, has been often given in evidence without proving it a true copy, because the original was lost.

Ibid. So a *recovery* of lands in *antient demesne* was given in evidence, where the original was lost, and possession had gone a long time according to the recovery.

Tri. per Pais 166. 3 Inst. 173. When a man gives in evidence the sworn copy of a record, he must give the whole copy of the record in evidence, for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore

therefore so much at least ought to be produced as concerns the matter in question.

[2.] *Of* Office *Copies.* These may be given in evidence. Here the difference is to be taken between a copy authenticated by a person trusted to that purpose, for there that copy is evidence; and a copy given out by an officer of the court, who is not trusted to that purpose, for that is not evidence, without proving it actually examined. The reason of the difference is, that where the law hath appointed any person, for any purpose, the law must trust him as far as he acts under the authority which the law hath lodged in him; otherwise it would be to give credit to another officer, and not to him at the same time.

Therefore the *chirograph* of a *fine* is evidence to all persons of such a fine, for the *chirographer* is appointed to give out copies of those agreements between the parties, which are lodged of record, and therefore his copy must be admitted as evidence, without further dispute. G. L. E. 24.

So where a deed is inrolled, the indorsement of that inrollment is evidence, without further proof of the deed; because the officer is intrusted to authenticate such deeds by inrollment; and when such officer indorseth, that he hath done it pursuant to the law, the law which entrusted him with the authority of doing it, ought to give credit to what he has done. Ibid.

But if an officer of the court, who is not intrusted to that purpose, makes out a copy, the party ought to prove it examined; the reason is, because being no part of his office, he is but a private man, and a private man's

meer writing, or word, ought not to be credited, without his oath.

G. L. E. 25. Therefore it is not enough to give in evidence a copy of a *judgment*, though it be indorsed to have been examined by the clerk of the treasury, because it is not part of the office of such clerk; for he is only intrusted to keep the records, for the benefit of all men's perusal, and not to make out copies of them.

Ibid. So if the deed inrolled be lost, and the clerk makes out a copy of the inrollment only, this is no evidence, without proving it examined, because the clerk is intrusted to authenticate the deed itself by inrollment, and not to give out copies of the inrollment of the deed.

Ibid. As to the office copies of depositions, they are evidence in *Chancery*, but not at common law, without examination with the roll; for the court of *chancery* hath for convenience, allowed its office copies to be evidence in its own court, and hath impowered the officers to make out such copies as should be evidence; but the particular rules of that court are not taken notice of by the courts of common law.

G. L. E. 26. Chutel and Pound. Trin. Ass. 1700. Where a fine with proclamations is to be a bar to a stranger, there the proclamations must be examined with the roll; for although the *chirographer* is authorised by the common law to make out copies for the parties of the fine itself, yet he is not appointed by the statute, to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.

Vid. Tri. per Pais, 209.

Having thus shewn how the record is to be given in evidence, by proving a copy, we must in the next place see in what manner,

ner, and in what cases, they ought to be evidence.

And here in the first place, it is generally true, that when a *record* is pleaded, and appears in the allegations, it must be tried on the issue, *nul tiel record*; but where the issue is upon a *fact*, the *record* may be given in evidence to support that *fact*.

When the issue is *nul tiel record*, the record must be brought *sub pede sigilli*; but where the record is offered to a jury, any of the forementioned copies are evidence. Style. 22.

But to this rule there is an exception, that where the record is inducement, and not the gist of the action, there it is not of itself traversable, but must be given in evidence on the trial of the action, for nothing can be of itself traversable, that doth not make a full end of the matter in question. 2 Sid. 140.

When any person produces a record, it must be so much at least as concerns the matter in question, for it is no evidence, unless you shew the whole import of the matter; for the preceding or following words may give it quite another face. *Query, If the whole record ought not to be produced? Vide ante.* G. L. E. 27. Tri. per Pais. 166. 3 Inst. 173. 1 Mod. 117.

[3.] Of

[3.] *Of recoveries to bar Entails.*

G. L. E. 27.
1 Mod. 117.

WHERE a *recovery* is antient, you need not prove any seisin in the tenant to the *præcipe*; but otherwise it is in a modern recovery; for in an antient recovery, the presumption is for the recoveror; for the recoveror shall be supposed to be seised at the time of the recovery, since he hath been seised ever since; but in a modern recovery, the seisin must be proved; for the *præcipe* doth not lie against the person that is seised of the freehold, and so the recovery wants a foundation, because the action is not prosecuted against the tenant of the freehold. *Vide infra.*

Vide infra at the close of this head.

1 Vent. 257.
2 Strange 1129, 1185, 1267.

Tenant for life, the remainder in fee, and he in the remainder in fee, suffers a common recovery, with single voucher, and this recovery is antient; the court will presume a surrender of the tenant; because, when there hath been a constant enjoyment under that recovery, it shall be supposed to have had a lawful foundation, for unless there had been a lawful tenant to the *præcipe*, it must be supposed, that it would have been controverted and overthrown. *Vide infra.*

1 Vent. 257.

But if there be tenant for life, the remainder in fee, and he in remainder suffer a common recovery, with single voucher, and this recovery is modern, the record will not give a title, for the freehold is in the tenant for life, and the *præcipe* ought to be brought against him; and so there is no lawful action commenced. *Vide infra.*

If

If there be tenant for life, with remainder in tail, and they both join in a common recovery with single voucher, this will not bar the tail, because the remainder man is not tenant to the *præcipe*; and in this case the *præcipe* is brought against them both as joint-tenants, and he in remainder hath no immediate estate of freehold in him, and the remainder man is not bound by the recovery had against the tenant for life, unless he comes in upon the *aid prayer*, though the remainder is turned to a right, by such recovery. Moor. 256. pl. 402. 2 Rol. Ab. 395. Piggot on recoveries 36.

But if there be tenant for life, the remainder in tail, and they suffer a recovery, and come in as vouchees on the double voucher, then he in remainder is barred, because he in remainder is as properly called in as vouchee, as if he had been called in on the *aid prayer* of tenant for life, and when he takes up the defence, and makes default, he must be barred by the judgment, as for the want of a title appearing; for where any person is properly in court, and doth not defend his title, he is as properly barred, as he who hath no title at all; and when tenant in tail is barred for want of title, the issue can never after recover in his *formedon*. 2 Rol. Ab. 396.

Now, by statute, recoveries are good without surrender of lessee for life. 14 G. 2. c. 20.

Purchasers in possession after 20 years, may give evidence of recovery, by the deed creating the tenant to the *præcipe*. Id. § 4.

After 20 years a recovery is good, though deed lost, &c. Id. § 5.

A deed, &c. executed the same term, is good to make a tenant to the *præcipe*. Id. § 6.

[4.] *Of Verdicts, Nonsuits, &c.* and *evidence upon former trials.*

Lewis and Clerges, Term. Pasch. 1700. Trial at bar. G. L. E. 29.

IF a *verdict* be had on the *same point*, and between the *same parties*, it may be given in evidence, though the trial was not had for the *same lands*; the verdict in such cases being very strong evidence, because what twelve men have already thought of the *fact*, may be supposed fit to direct the determination of the present jury; for to go contrary to what a former jury have decided, in relation to any fact, is to arraign the honesty and sincerity of their judgment; and there is that credit to be given to twelve men of the country, discerning of any *fact* upon their oaths, that no second jury ought *rashly* to depart from their judgment; their verdict also further stands in credit, because the jury must be supposed honest men, and men of clear reputation, their verdict not having been attainted by the party against whom it was given.

Lewis and Clerges.

But then the verdict ought to be between the *same parties*, because otherwise, a man would be bound by a decision, where he had not had the liberty to cross-examine, and nothing can be more contrary to natural justice, than that any one should be injured by a determination that he was not at liberty to controvert; for that is to set up a decision unexamined, in prejudice of a cause that is under examination; besides, one that is not party to the trial, has no redress for the injury, if the verdict were false, for he

cannot

cannot have an attaint, and therefore ought not to be injured by the verdict. *Nor can he move for a new trial.*

But it is not neceſſary that the verdict ſhould be in relation to the *ſame land*, for it is only ſet up to prove the *point* in queſtion; and if the verdict ariſe upon the *ſame queſtion*, then it is no doubt good evidence, for every matter is evidence, that amounts to the proof of the *point* in queſtion. Lewis and Clerges. Vide 1 Str. 308. 2 Str. 1151.

So a verdict in another action for the ſame *cauſe*, ſhall be allowed in evidence, between the *ſame parties*. 3 Com. Dig. 281.

Though judgment was afterwards arreſted for want of form. 2 Rol. 46.

So it ſhall be evidence, where the verdict was for one, under whom any of the preſent parties claim. 3 Com. Dig. 281.

So a verdict for or againſt a *leſſee*, ſhall be evidence for or againſt him in *reverſion*. Per Holt. 6 An. Hard. 472.

So a verdict for him in *remainder* ſhall be evidence for a *ſubſequent remainder-man*, in the ſame deed; for though he does not claim under him for whom the verdict was given, yet he claims by the ſame deed. R. 8 W. 3. B. R. Ld. Ray. 730.

Judgment of *ouſter* againſt bailiffs of a corporation, is good evidence againſt one making title as elected under their bailiff-ſhip. Rex v. Hebden, P. 12 G. 2. Stra. 1109.

A verdict for or againſt a *plaintiff*, with proof of the evidence by him given, ſhall be evidence in an action by another againſt him, for the *ſame thing*. As, in an action by a *common carrier* for goods delivered by miſtake, a verdict for or againſt the plaintiff, with the proof by him given, ſhall be evidence in an action by the *owner* againſt the *carrier* for the ſame goods. 3 Com. Dig. 281. per Holt at Guildhall. 14 W. 3.

So

3 Com. Dig. 281. R. 5. An. in C. B.

So a *nonsuit*, with proof of evidence then given, shall be allowed as evidence against him in another action by the *same plaintiff*.

3 Com. Dig. 281. R. 2 Rol. 680. l. 5.

So, if the jury are agreed, and afterwards discharged before the verdict given and recorded, it shall be allowed for evidence, that the jury were agreed, in the case of a common person. *Sed Qu?*

Jones v. White. M. 4 G. Str. 68.

Whether the *coroner's inquest* might be read as evidence against the executrix, to whose advantage it was, *dubitatur*. *Parker*, *C. J.* and *Powys*, *J. pro*. *Eyre*, *J.* and *Pratt*, *J. con*.

Leighton v. Leighton, P. 6 G. Str. 308.

An inquisition *post mortem*, traversed, and trial thereon, though voidable, is evidence.

Neal v. Wilding, P. 14 G. 2. Str. 1151.

A *special verdict*, to which defendant was no party, given in a cause in which the premisses in question were recovered on a general verdict, and the special verdict related to other premisses, shall not be allowed as evidence, even of a pedigree.

3 Com. Dig. 281. Vide Hard. 118, &c.

If a *verdict* be offered in evidence, it ought to be proved by an exemplification of the verdict, and judgment upon it.

Pitton v. Walter, H. 5 G. Str. 162.

The *postea* is no evidence of the verdict, without a copy of the final judgment; for judgment might have been arrested, or a new trial granted.

G. L. E. 30. 1 Sid. 325.

In an action of trespass, the indictment for the same trespass, and verdict for the same trespass, shall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cause (which it certainly is not) then cannot the verdict which is founded only on the party's own oath be any evidence; for what cannot be evidence directly

rectly, cannot be made evidence by any such circuity.

But where the verdict on the indictment is founded on other evidence, besides the party's own oath, the verdict may be given in evidence; for in such case, the verdict seems to be under the same general rule with all others, and there the judgment of twelve men on the *fact*, ought to sway in determination of the same *fact*, whether the verdict be on indictment or action; but yet it may be objected, that the fact might find credit from the party's own oath, which ought not to support the action, and since the evidence is so intermixed, that it doth not appear on what it was founded, the verdict cannot be produced in corroboration of the evidence on the action. *Query, If this objection is not a good one?* G. L. E. 31. This is the practice, ex relatione Mr. Phipps, 1700. Objection.

It is true, this doth in part take off the force of such evidence; for as (when a verdict is produced in evidence) it may be answered, that it did not arise from the merits of the cause, but from some formal defect of the proof, and that makes it no evidence towards gaining the point in question; so a verdict may be diminished in point of authority, by shewing that it was in part founded on the oath of the party interested in the action; and the jury are to respect it no farther than as they presume it given, and supported by the credit of other witnesses who are not concerned in the cause. *Query, How can this appear to the court, without* viva voce *evidence?* Answer. G. L. E. 31.

Yet others have said, the verdict given on the indictment cannot be given in evidence, because 2d Objection. G. L. E. 3–

because on that prosecution, the party cannot attaint the jury, as he may, if injured in a civil action, *ideo quære?*

G. L. E. 32. 1 Sid. 325. In an appeal, the verdict on the indictment cannot be given in evidence; for where the life of a man is concerned, the jury must weigh and consider it from the evidence then offered, and not from any precedent of what was formerly done by others; as, in the case of blood it seems inconvenient and dangerous, that the determination should be governed by any thing out of the evidence, especially since by the policy of the common law, there could not be a double trial, and one acquittal was always a bar to another.

G. L. E. 32. Per Holt, Jacque's case. Now when the statute of *Hen.* 7. altered that, and made the indictment cotemporary with the appeal, it never intended they should have any relation to each other.

G. L. E. 32. A *verdict* in a *criminal* case, where the matter was capital, was refused to be received in evidence in a civil case; as where the father was acquitted on an indictment for having two wives, this could not be given in evidence in a civil case, where the validity of the second marriage was controverted; the reason seems to be, because much less evidence is necessary to maintain an action than to attaint a criminal, and therefore his acquittal was no argument that the fact was not true.

G. L. E. 33. If a *verdict* be given against the defendant on the *same point*, though another party were plaintiff, yet in some cases it may be given in evidence; as if there be a trial of title between *A.* lessee of *E.* and *B.* and afterwards there be a trial of the same title between *C.* lessee of *E.* and *B.*; *C.* may give the verdict

 found

found againſt *B.* in evidence upon the trial between him and *B.* for this was the ſenſe of a former jury on the fact.

If an *ejectment* is brought againſt ſeveral perſons, and there be a verdict againſt one, that verdict cannot be given in evidence againſt the reſt, for it is the party only againſt whom the verdict is given, that can have relief by attaint, in as much as the reſt are not prejudiced; and they ſhall not be injured by a verdict they had not power to controvert. 3 Mod. 142.

If a man has two wives, and be thereof convicted, and dies, and the ſecond wife claims *dower*, the verdict and conviction cannot be given in evidence, but in this caſe the writ muſt go to the biſhop; for whether the marriage be lawful or not, is the point in controverſy, and that is of eccleſiaſtical juriſdiction, and is not to be decided at common law. 3 Mod. 164.

But the verdict may be made an exhibit in the cauſe before the biſhop, to induce him to believe there was a former marriage. G. L. E. 34.

However, this rule of giving verdicts in evidence on the *ſame point*, is to be taken with great reſtriction; for nobody can take benefit by a verdict, that would not have been prejudiced by it, had it gone contrary; and therefore if a termor for years had recovered againſt *B.* the reverſioner might give ſuch verdict in evidence, for *B.* has no prejudice, becauſe he hath the liberty to croſs-examine the witneſſes, and to attaint the jury; and it is fit the reverſioner ſhould make uſe of the verdict, and have benefit by it, ſince he had been diſpoſſeſſed by the verdict, if it had gone againſt the termor, and therefore he may offer it in evidence. So if there be tenant for life, the reverſion in fee, and *B.* bring an Lord Howard and Lady Inchiquin, 1700. Hard. 472.

ejectment against the tenant for life, and a verdict is given for the defendant, it seems that the reversioner may give this in evidence against *B.* because he would have been prejudiced in case *B.* had recovered, as his reversion would have been turned to a naked right in him. *Quære et vid. infra.*

Hard. 472. But a person that is not prejudiced by a verdict can never give it in evidence, though his title turns upon the same point; because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant; and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, that since the cause is a new matter between the parties, that the jury should be swayed by any prejudice; for the letting in of pre-judgments supposes that the cause has been already decided, and that it is not tried and debated as a *new* matter, but as the effect of some litigiousness in the defendant that holds out the possession, when the cause has been decided against him; and this prejudice ought not to be thrown upon him on a new enquiry.

Hard. 472. Rushworth, Viscountess of Pembroke and Currier. As if *A:* prefers a bill against *B.* and *B.* exhibits his bill, in relation to the same matter against *A.* and *C.* and a trial at law is directed, *C.* cannot give in evidence the depositions in the cause between *A.* and *B.* but it must be tried entirely *ut res nova.*

A. lessee of *B.* brings an ejectment against *D.* and the verdict goes for the defendant; this may at any time be given in evidence against *B.* for the possession of *B.*'s lessee is his own possession, in as much as the lessee doth only *tenere in nomine alieno*, and *B.* might in this case give any thing in evidence, as well

well as the plaintiff himſelf, and challenges might have been made to the jury for conſanguinity to *B.* the reverſioner: therefore, ſince *A.* hath the poſſeſſion of *B.* as his bailiff, if there be a verdict againſt that poſſeſſion, it muſt conclude *B.* for he had in this caſe liberty to croſs-examine as well as *A.* himſelf.

But if there be a recovery againſt tenant for life, by verdict, this is not evidence againſt the *reverſioner*, for the tenant for life is ſeiſed in his own right, and the poſſeſſion is properly his own, and he is at liberty to pray in *aid* of the reverſioner or not, and the reverſioner cannot poſſibly controvert the matter where no *aid* is prayed, for he hath not any permiſſion to intereſt himſelf in the controverſy. Hard. 426. per Glynn.

In the caſe of an antient verdict in *prohibition*, where the cuſtom of tithing is ſet out, it hath been a queſtion whether it might be given in evidence againſt another pariſhioner that was not party to the verdict, nor had the lands in queſtion; and held by ſome that it might be given in evidence, becauſe it could not be ſuppoſed to have been a contrivance to alter the cuſtom, as it appeared to be antient, and it ſhewed what was then thought to be the cuſtom. Per Opini. J. Dod, in the caſe of the vicar of Rolvend.

If a verdict be given againſt *I. S.* and then judgment arreſted, and then *I. S.* aliens to *I. N.* it ſeems that the verdict given againſt *I. S.* may be given in evidence againſt *I. N.* for the alienation of *I. S.* cannot put *I. N.* in a better condition than *I. S.* was, for the ſubſtitute of *I. S.* can but ſucceed into his place, and at the time of the alienation, the verdict might have been given in evidence againſt *I. S.*; and *I. S.* cannot, by alienation G. L. E. 37. 2 Rol. Ab. 680. 3 Mod. 142.

 deſtroy

destroy the advantage that his adversary ought to derive from the verdict; for though *I. N.* had not the liberty to cross-examine upon his title, yet *I. S.* had, and *I. N.* has but *his* title, and therefore could not be supposed to make the fact better on the examination. *Sed qu. as the judgment was arrested, if any judgment can be said to exist?*

2 Rol. Ab. 679, p. 10. 1 Vent. 28. Raym. 84. 2 Stra. 984.

In an information by the attorney general for the King, when the jury are ready to give a verdict *, the attorney general may withdraw a juror, for this is part of the prerogative, and is in lieu of a nonsuit of the subject; for the King cannot be nonsuited, being always in court; and this prerogative arises from, or is founded on, the King's employment for the public safety; and therefore if he hath failed in any point of proof, so that disadvantage may be expected from the verdict, it shall be at his election, whether he will receive the verdict or not; and therefore, in a second information, none of the first jury shall be admitted to give in evidence, that they were agreed in their verdict, for such evidence would be of the same weight, as if the verdict had been given, and thereby the king would be dispossessed of the benefit of his prerogative.

2 Rol. Ab. 680. Tri. per Pais, 213.

Query.

But if the King aliens the estate on which the trial was had, so that it comes into private hands, there on a second trial between private persons, the agreement of the jury may † be given in evidence, for the prerogative is annexed to the crown, and cannot extend to any private person, and therefore they take

* Holt says it was the opinion of all the judges of England, that it must be by consent. Carth. 465. 2 Keb. 507.

the

the eſtate with the diſadvantage of having a verdict againſt them.

But then on ſuch trial they muſt have the record of the proceedings, on the firſt information, becauſe as a verdict cannot be given in evidence without the record, which gave authority to the jury to proceed, no more can they give in evidence the agreement of the jury, without the record on which they were impanelled. 2 Rol. Ab. 679. a. 3.

A man has two manors, called *Dale*, and levies a fine of the manor of *Dale*; circumſtances may be given in evidence to prove which manor he intended; for ſince the fine is uncertain, as to the identity of the name, it is fit that it ſhould be reduced to a certainty by proof, that the fine may not loſe the operation which the parties intended. 2 Rol. Ab. 676. a. 11.

In plene adminiſtravit an execution executed, cannot be given in evidence without the judgment, becauſe there does not appear to be any authority for ſuch execution, without the judgment: where the execution is of record, and the authority for ſuch execution is alſo of record, they muſt both appear to the jury, otherwiſe they have not the utmoſt evidence of the fact in queſtion. At Guildhall. per Holt. Tri. per Pais, 227.

Upon *plene adminiſtravit*, an account given in to the ordinary, cannot be evidence, nor is it to be any way regarded. 2 Rol. Ab. 678. Turvie's caſe, Tri. per Pais, 235.

This muſt mean *for* the *defendant*; but ſurely it is evidence for the plaintiff to charge the defendant, if it appears that there are aſſets.

In debt againſt an executor, the defendant pleads that the teſtator was taken in execution by a *Capias ad ſatisfaciend'*, and found that he was taken in execution on an *Alias Capias*; this is well enough, for an *alias capias* is but G. L. E. 39, 40.

 the

the same *capias* renewed, and doth not differ from it in substance, but in circumstance only, as being the second process of the same nature; but if they had found that he had been taken in execution by a *capias pro fine*, or by a *capias utlagatum*, this had not maintained the plea, because these are not the same sort of executions with the *Ca. Sa.* but are in their nature distinct: but when the jury find that the party was taken in execution upon an *alias capias*, it shall be intended upon the same judgment, without any averment; because the writ exhibited to the court shall not be intended quite foreign to the matter, but arising out of it; and therefore it must be intended an *alias capias* on the same judgment, otherwise there would be no reason to prefer it as a doubt, for it is out of controversy, that a *capias* upon another judgment could not possibly maintain the plea.

G. L. E. 69, &c. Sherwin and Clerges, Mich. Term. 12 W. 3. 1 Stra. 162.

Another way of perpetuating the testimony of a person deceased, is by giving the verdict in evidence, and the oath of the party deceased: where you give in evidence any matter sworn at a former trial, it must be between the *same parties*, else you deprive your adversary of the liberty of cross-examining; besides, otherwise, you cannot regularly give the verdict in evidence; and where you cannot give the verdict in evidence, you cannot give the oath on which it was founded; and unless you shew there was such a cause, you cannot shew that any person was examined in that cause; and without shewing there was a cause, no man's oath can be given in evidence, in as much as that would appear to be a voluntary affidavit.

What a man himself that is living has sworn at one trial, can never be given in evidence at another trial to support him, (though what the witness has said in discourse may be given in evidence to support him;) because the same oath at another trial, is not evidence of the truth of any man's swearing; for if a man be of that ill mind to swear falsly at one trial, he may do the same on the other, from the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him; but if a man hath sworn at one trial different from what he hath at another, this is good evidence as to his discredit. G. L. E. 69. Sherwin and Clerges, M. 12 W. 3. 2 Hawk. P. C. 430.

Query. As to evidence of a discourse? If this is law, I conceive it must be upon this ground, that the witness hath always been consistent.

On an appeal of murder, the appellant cannot give in evidence the indictment, and what a person deceased swore at the trial; for in this case, we have already shewn that the indictment cannot be given in evidence against the defendant, and consequently the evidence of the deceased witness on the indictment cannot be given upon the appeal; besides, the appeal is tried as a new cause, and therefore it is necessary for the defendant to have his accusers face to face. 1 Sid. 325. 2 Hawk. P. C. 430

If the indictment be given in evidence for the prisoner, and the oath of a person deceased, the account of that oath must be upon oath, for although there is no reason that the indictment should not be given in evidence for the prisoner to prove he was once acquitted of the same fact, and in favour of life none G. L. E. 70. 1 Sid. 325.

of the evidence ought to be loſt, yet the account of that evidence ought to be upon oath, for nothing can be given in evidence as an oath, but upon oath.

G. L. E. 70. Raym. 170. In an information for perjury on a trial in ejectment, on not guilty, the defendant inſiſted that what he ſwore was true, and to prove the perjury, one was produced to prove what a perſon deceaſed ſwore at the former trial in ejectment; and this was allowed to be good evidence, becauſe it doth not go to the proof of the *charge* itſelf, that the defendant ſwore, but only to the falſity of the fact that was ſworn, and it was inſiſted that the *charge* itſelf which conſiſted in the *proof*, and what the defendant *ſwore*, might be directly proved by ſuch evidence as the defendant might croſs-examine; but the falſity of the fact which the defendant ſwore to, might be made out by any other proof, becauſe in ſuch caſe you muſt give the verdict in evidence, in as much as the cauſe in which the perjury was committed, muſt be ſet forth in your information, and conſequently be proved on your iſſue; and when you have proved that the defendant ſwore in the cauſe, you may ſhew the whole matter, *viz.* how his teſtimony ſtood oppoſed by the evidence of the party deceaſed.

[5.] Of

[5.] *Of Writs, &c.*

WHEN a writ is only *inducement* to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is not a record, and therefore the copy of it is not required; but where a writ itself is the *gist* of the action, you must have a copy from the record, in as much as you are to have the utmost evidence of which the nature of the thing is capable. G. L. E. 40. Tri per Pas 167.

In an action of trespass against a bailiff for taking of goods in execution, the bailiff must not only give in evidence for his defence on *not guilty*, the judgment *, but he must also shew the writ of execution, by virtue of which he took the goods; and it is not enough merely to shew the sheriff's warrant on the writ, for when the writ of execution is returned, as it is presumed to be, immediately after the execution served, it is of record, and a record cannot be proved by any thing less than itself, and the warrant on the writ is not any proof of the record itself. G. L. E. 40.

* Query, If proof of judgment is necessary; and if a justification is not necessary?

i. e. an authentic copy.

In an action brought by an attorney for his fees, it is sufficient to prove the taking out the writ, by a warrant made by the coroners, for the writ may not be returned of record, and consequently is not any record; in which case the warrant made by the coroners is sufficient to prove a title to his fees, for the attorney in this case is intitled to his fees, whether the writ be returned or not. G. L. E. 41. Silby v. Hinckly Trin. Ass. 1701. per Gold.

N. B. *He ought to have an authority in writing from his client, to sue or defend.*

[A.] P. (II.) OF PUBLIC WRITTEN EVIDENCE.

II. OF WRITINGS not of RECORD.

[1.] Of *Decrees* in Chancery.
[2.] Of *Bills* in Chancery.
[3.] Of *Answers* in Chancery.
[4.] Of *Depositions*.
[5.] Of *Affidavits* in *Equity* and *Law*.
[6.] Of *Proceedings* in the *Spiritual* and other Courts.
[7.] Of *Rolls* of *Courts*, *Baron*, &c.
[8.] Of *Registers*, &c.
[9.] Of the *Pope's Licence*, and *Bull*.
[10.] Of *Public Books*, &c. Such as *Domesday Book*.—Books in the *Herald's* Office.—The *Navy* and other public Offices.—*Surveys*.—*Terriers*.—General *History*.—And *Inventories*, &c. taken by *Sheriffs*.

General Observations.

THOSE things that stand second in point of *probability*, are all *public* matters which are *not* of *record*. G. L. E. 48.

Those *public* matters which are *not* of *record* do all come under this general definition: they must be such matters as have an evidence in themselves, and that do not require an illustration from any other thing; such are transactions in Chancery; copies of court rolls, &c. and the copies of such things may be given in evidence,

dence, in as much as there is a plain and coherent proof, for the things themſelves are ſuppoſed to be ſelf-evident, and conſequently when a copy of them is produced upon oath, you have a full proof, becauſe you have proved upon oath, a matter which when produced would carry its own light with it, and conſequently would not need any proof.

Objection. Objection. But here it will be objected, that this is not the utmoſt evidence of which the nature of the thing is capable, for theſe teſtimonies themſelves muſt be better than the copies of them.

Anſwer. To this the anſwer is, that the copy upon oath is reckoned as an equivalent to the thing itſelf; and the teſtimony itſelf muſt not be rigidly required, becauſe ſince theſe things lie for the public ſatisfaction, every man hath a right to their evidence, and they cannot be in ſeveral places at the ſame time, and therefore the things themſelves cannot be demanded, but only the copies of them.

The firſt ſort of teſtimonies that are not of record, are the proceedings of the court of *Chancery* on the *Engliſh* ſide.

N. B. The juriſdiction of the Court of *Chancery* is twofold; *ordinary*, according to the cuſtom of the common law; *extraordinary*, *viz.* as a Court of Equity. It is concerning *equity* proceedings we are going to treat.

Co. Lit. 260. a. The reaſon why the proceedings in *Chancery*, and the rolls of the court are not records, is this, becauſe they are not the precedents of juſtice; for the proceedings in *chancery* are founded only on the circumſtances of each private caſe, and they cannot be rules to any other; and the judgment there is *ſecundum*

equam

equam et bonum, and not *ſecundum leges et conſuetudines*; and the reaſon why any record is of validity and authority is, becauſe it is declarative of the ſenſe of the law, and is a memorial of what is the law of the nation: but *chancery* proceedings are no memorials of the laws of *England*, becauſe the Chancellor is *not* bound to proceed according to law.

Now, becauſe theſe ſeveral proceedings are G. L. E. 49. not records, they are conſequently not ſuch memorials as are lodged inſeparably in any certain place, but are transferrable from one place to another, and therefore may be themſelves given in evidence.

But it is neceſſary to deſcend to particulars.

[1.] *Of Decrees in Chancery.*

1. Keb. 21.
2. Mod. 231.

A *Decree* in the Court of *Chancery* or *Exchequer* shall be evidence against the party, if an exemplification of it be produced, under the seal of the court.

1 Keb. 21.

Or a *decretal order* in paper, with proof of the bill and answer.

Cont. 1 Keb. 21. Semb. per Trevor at Guildhall. 9 An. inter Wheeler and Lowth.

So, if the bill and answer be recited, it is sufficient.

Per Cur. Twisd. Cont. 1 Keb. 21.

But a decree, which does not recite the bill and answer, shall not be allowed.

[2] *Of Bills in Chancery.*

A Bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; nor shall it be supposed to be preferred by the counsel* or solicitor, without the party's privity, and therefore is evidence, as to the confession, and admittance of the truth of any fact, by the party himself; and if the counsel hath introduced what is not true, the party may have his action: but where a bill is exhibited, and there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party, for a man may file a bill in another's name to deprive him of his evidence by a fictitious confession, and therefore a bill filed without any proceedings upon it has not the force of evidence, because it is not to be supposed that the party did himself file the bill, without any proceedings, to bring his adversary to answer such bill as it would be useless to the party, and therefore must be supposed rather to be filed by a stranger, to do him an injury: this is considered as standing in point of credibility in the same circumstances as a confession by letter, under the party's own hand, where no one saw the writing of it; though some have ranged it in an inferior degree, because the one is the party's own immediate confession, and the other is only the counsel's draft; yet it seems that an allegation in a court of justice, which amounts to the confession of a fact, ought to have more weight

G. L. E. 50.
1 Cha. Caf. 64, 65.
1 Sid. 221.

*Query. Lord Mansfield, in a case at nisi prius seemed to be of a different opinion, because of the frequent suggestions of counsel, not founded upon the instructions of their clients.

1 Chan. Cases 64, 65.
G. L. E. 50.

1 Sid. 221.

weight and authority than any private acknowledgment.

If a patron sues a simoniacal bond, and the parson prefers a Bill in Chancery to be relieved, the bill and proceedings upon it shall be given in evidence, on ejectment, to make void the parson's living.

1 Sid. 221. Snow and Philips.

Notwithstanding our preceding query in the margin of 111, there are authorities to shew that a bill in *Chancery*, or *Exchequer* shall be evidence against the *plaintiff* himself, if it was exhibited *with his privity*.

1 Sid. 221. R. Ca. Ch. 65.

And more especially if there was an answer, and other proceeding upon it.

Ca. Ch. 65. 1 Sid. 221.

And it hath been held that the proceedings upon a bill import *primâ facie* that it was with the complainant's privity.

3 Com. Dig. 284. per Tracy. 5 An.

The copy of a bill in Chancery wrote *close* on treble sixpenny stamps, may be read.

Denn v. Fulford, T. 1. G. 3. Burr. 1177, &c.

In the same case, *per* Lord *Mansfield*, an *office-copy* is, in the same court, and in the same cause, *equivalent to the record:* but in *another court* or in *another cause* in the same court, the copy must be *proved*.

Id. 1179.

[3.] *Of Answers in Chancery, &c.*

IF the bill be evidence against the complainant, much more is the *answer* against the defendant, and carries still a higher weight of probability with it, because this is delivered in upon *oath*, and therefore, over and above the single confession, it has an authority from the sanction of an oath. O. L. E. 51, 2. Godb. 326.

But when you read an answer, the confession must be *all* taken together, and you shall not take only what makes against the defendant, and leave out what makes for him; for the answer is read as the sense of the party himself, and if it is to be taken, you must take it entire and unbroken. Brochman's Case. Trin. Ass. 1701. per Gold. 2 Vern. 194, 288. 5 Mod. 10. Bath and Battersey.

But an infant's answer by his guardian shall never be admitted in evidence against him on a trial at law, for the law, has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by their guardian's oath, for the authority the law gives to the guardian, is for the infant's benefit, and not for his prejudice, and therefore the infant cannot be hurt by the guardian's oath. 2 Vent. 72. 3 Mod. 259. Carthew 79. 3 Williams 237. Answer of a feme Covert, v. 3 Williams 238.

We may farther observe, that to [illegible] answer, by any in *Chancery* in his own right, evidence against himself, you should prove the bill filed. [illegible] 386.

An answer to interrogatories, is evidence against the party answering. 3 Com. Deg. 284.

So an answer to a *libel* in the spiritual court; for it is tantamount to a confession. Per Trecy 6. Ann. 1. Ver. 53.

But an answer of a *trustee*, shall not be evidence against the *cestuy que trust*. 1 Keb. 281.

Nor the answer of a *vendor*, against an *alienee*. 1 Sal. 286. Mod. Ca. 44.

[4.] *Of Depositions.*

G. L. E. 58. WE shall in the next place treat of depositions; and here we must first consider in what rank they stand in point of credibility; and to elucidate this subject it may not be improper to give an account of their original use: we certainly received them from the civil law; it appears that the parties exhibited their interrogatories upon their several allegations, but the witnesses were privately examined upon these interrogatories, by the same judge that tryed the cause; so that the course antiently followed among the *Romans* was very different from the modern proceedings in Chancery, where the sense of the witnesses is stated by the examiner, on which the Chancellor is to judge.

Dig. Lib. 22. Tit. 5. § 3. de Test. pag. 278. That this was the antient course of the civil law, is very plain from *Adrian*'s Epistle to *Varus*, the Legatee of *Cecilia*, *Tu magis scire potes quanta fides habenda sit testibus, qui & cujus dignitatis, & cujus æstimationis sint, & qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an adeoqui interrogaveras ex tempore veri similia responderint.*

G. L. E. 59. These examinations were first made privately, that the judge might be possessed of the naked fact, and the sense of the witnesses was afterwards taken in writing, and then publication passed, that the judges might, if they had not sufficiently compared and weighed the examination, have all due assistance from the observations of the advocate: as the trials of the civil law thus stood, when the

judges viewed the behavior of the witnesses, there was very little difference * between this trial, and that of a jury, save only that trial by jury, is much more speedy, and the evidence more entire, whilst in the other way the judges took up the evidence at one time, and the gloss at another, and such breaking of the evidence might be dangerous to a weak judge, who did not duly consider the subject; besides, the judge not being of the neighbourhood, could not so easily distinguish the credit of the witnesses; and for this reason also the trial by jury is preferable to the examination of the civil law, when under the best regulation. And no doubt in our Chancery proceedings, the witnesses were formerly examined by the masters, who sat in the court to inform the Chancellor of their credibility, 'till causes so multiplied, that the masters were employed in other affairs, and therefore the examination of witnesses was left to the examiners.

* Only that the judges are appointed by the Crown, and are for life; whereas jurors are drawn by ballot, and that for each cause; and exceptions of various kinds may be taken to them, which is not the case as to judges appointed by the Crown.

Doubtless the credit of depositions *cæteris paribus* falls much below the credibility of a present examination *viva voce*, for the examiners and commissioners in such cases do often dress up secret examinations, and give them a very different air from what they would have if the same testimony had been plainly delivered, under the strict and open examination of the judge at *nisi prius*. Vide Introd.

But though these depositions fall short of examinations *viva voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer, sworn to that purpose, from the very mouth of the witness, is of more credit, than what a stander-by retains in memory; for the images of things decay, by the perpetual change of appear-

ances; but what is reduced to writing, continues constantly the same; so that we cannot be certain on a verbal attestation, but that some circumstances of the fact may be lost in the recollection.

Mr. Justice *Fortescue* in the Preface to his Reports (p. iii.) speaking of the benefit of trials by juries, and witnesses examined *vivâ voce*, says, "It is often in experience (as I have myself) found that after a matter of fact, on the written testimony of the witnesses, has appeared to be one way, on examination of the same witnesses *vivâ voce*, on a trial at law, granted in the same cause, the truth has come out to be clearly the quite contrary. The mien and behavior of a witness, his countenance, and the passions of his mind, oftentimes discover those truths which are never to be found out from a dead deposition. This rule therefore of determining causes by a jury is called, by one of the greatest men of the age he livid in, and also Chancellor, *viz.* Lord *Bacon*, the *lanthorn* of *justice*." *We recommend to every lawyer to peruse this preface, not only for the great learning it contains, but that he may be convinced how necessary a knowledge of the Saxon tongue is to gentlemen of the profession.*

We must in the next place see in what cases *depositions* may be read.

Godb. 326. 1 Salk. 286. 2 Strange 920. Fry & Wood, 1 Atk. 445.

1st. They may be read in a suit at law between the same parties where the witnesses are dead, for if the witnesses are living, depositions are not the best evidence of which the nature of the thing is capable, and therefore cannot be read; but where the witness is dead, the deposition is allowed; for as records perpetuate the decisions of law, so depositions are the only method to perpetuate the memory of the

the fact, and therefore they must be trusted, where the witness is not in being.

2dly. Where a witness is sought, and cannot be found, you may, upon oath of the matter, use his depositions; for when it appears by oath, that he cannot be found, it is the best evidence that possibly can be had of the matter; because when a witness is sought, and cannot be found, it is just the same with respect to the party who wants his evidence, as if he was dead. Godb. 326. Sho. 363. Fry v. Wood, 1 Atk. 445.

3dly. If it be proved that a witness was subpœnaed, and fell sick by the way, or that he is not amenable, his deposition may be allowed to be read; for in such case the deposition is the best evidence that can possibly be had, and that answers what the law requires. 1 Mod. 283, 4. Sho. 363. Fry v. Wood. 1 Atk. 445.

Depositions taken thirty years since, were admitted to be read in Chancery, though the parties were not the same, in as much as the cause related to the *same land*, and the tertenants were parties to it, and those witnesses were dead, the plaintiff's title not then appearing. And this is an indulgence of the Chancery beyond the strict rules of the common law, and is admitted from necessity, because evidence should not be lost; besides, Chancery hath great faith in its own examiners (supposed to be indifferent persons,) who do by themselves take the sense of the parties so strictly, that by those means the depositions stand the fairer to be read at any time. *Vide infra.* 1 Cha. Cas. 73. Vide infra.

4thly. A deposition cannot be given in evidence against any person that was not party to the suit, and the reason is, because he had no liberty to cross-examine the witnesses; and it is against natural justice that a man should Hard. 472. v. Supra & infra.

 be

be concluded in a cauſe, to which he never was a party.

Idem. vide ſupra & infra.

5thly. A man ſhall never take advantage of a depoſition, that was not party to the ſuit, for if he cannot be prejudiced by the depoſition, he ſhall never receive any advantage from it, for this would create the greateſt miſchief that could be; as, in ſuch caſe, a man that never was party to the proceedings in Chancery, might uſe againſt his adverſary all the depoſitions that made againſt him, and he could not uſe the depoſitions that made for him, becauſe the other party not being concerned in the ſuit, had not the liberty to croſs-examine, and therefore cannot be encountered with any depoſitions out of the cauſe.

Ray. 335. 2 Jon. 164.

6thly. Depoſitions before an anſwer put in, are not admitted to be read, unleſs the defendant appears to be in contempt, for if a cauſe doth not appear to be depending, then the depoſitions are conſidered as voluntary affidavits; for unleſs a ſuit is ſhewn to be commenced, it doth not appear that the adverſe party hath had liberty to croſs-examine; but if the adverſe party hath been in contempt, then the depoſitions of the witneſſes ſhall be admitted, becauſe it is the fault of the objector, that he did not croſs-examine the witneſſes, as he would not join in the examination.

1 Ch. Caſ. 175. 1 L. Raym. 735. Backhouſe and Middleton.

When the bill is diſmiſſed, the rule as to the reading of the depoſitions is this, where the bill is diſmiſſed becauſe the matter is not proper for equity to decree, yet the depoſitions as to the fact in the cauſe may be read afterwards in a new cauſe, between the *ſame parties*; for though the matter is not proper for

for equity to decree, yet there was a cauſe properly before the court, as it is proper for the juriſdiction of equity to conſider how far the law ought to be relaxed, and moderated; and where there is a cauſe properly before the court, for whomſoever that cauſe be decided, yet the depoſitions in that cauſe muſt be evidence, as well as in others.

But if a cauſe in equity be diſmiſſed for the *irregularity* of the complainant, the depoſitions in that cauſe can never be read; as where a deviſee, on a ſuit pending, originally inſtituted by his deviſor, brings a bill of revivor, and ſeveral depoſitions are taken, and then the cauſe on the hearing is diſmiſſed, becauſe a deviſee claiming as a purchaſer, and not by repreſentation cannot bring a bill of revivor in this cauſe; and in a new original bill exhibited, the deviſee cannot uſe the former depoſitions; for in the firſt cauſe, miſtaking the bill that he ought to have brought, there was no complaint before the court, ſince the court doth not allow any deviſee to complain in that manner, by right of repreſentation; and there being no cauſe regularly before the court, there could not in ſuch caſe be any depoſitions. 1 Cha. Caſ. 175.

In croſs cauſes in equity, an agreement was proved in one of the cauſes, and in that cauſe it was not ſet forth in the allegations of the bill or anſwer; in the other cauſe the agreement was ſet forth in the bill, and not proved in the cauſe; and an order was obtained before publication, that the ſame depoſitions ſhould be read in both cauſes; and by the better opinion this might be, for ſince the order was before publication in the ſecond 1 Cha. Caſ. 236.

cauſe, the defendant had liberty to croſs-examine the witneſſes as to any particulars he pleaſed, and the ſight of the depoſitions was to his advantage.

Hard 315. 2 Ion. 164. 1 Williams, 414, 415. 2 Williams, 563

If a witneſs be examined *de benè eſſe*, and before the coming in of the anſwer, the defendant not being in contempt, the witneſs dies, yet his depoſition ſhall not be read, becauſe the oppoſite party had not an opportuity to croſs-examine him, and the rule of the common law is ſtrict to this, that no evidence ſhall be admitted but what is, or might be, under the examination of both parties.

2 Ion. 164.

But in ſuch caſes as theſe, the way is to move the Court of *Chancery*, that ſuch a witneſs's depoſitions ſhould be read; and if the court ſee cauſe, it will be ordered, and this order will bind the parties to aſſent to the reading of ſuch depoſitions, though it doth not bind the court of *niſi prius*; and this is thought juſt, becauſe the witneſſes are examined by the officers of the court, who are ſuppoſed not to favour either party.

2 Keb. 31.

Formerly they did not inroll their bill and anſwer, but as it ſeems, the bill was left looſe in the office with the clerks, and was thereby ſubject to be loſt; and therefore antient depoſitions may be given in evidence, without the bill and anſwer.

Practice of Chanc. 7.

The antient practice was alſo, never to publiſh the depoſitions of witneſſes, *in perpetuam rei memoriam*, during their life-time, becauſe the depoſitions were of no uſe 'till after their death; but this practice was found very inconvenient, becauſe witneſſes became thereby ſecure in ſwearing whatſoever they pleaſed, in as much as they could not be

proſecuted

prosecuted for perjury, the effect of their oaths not being known 'till after their death.

On an information for perjury the deposi- 3 Mod. 116, 117.
tions in *Chancery* signed by the commissioners, is not sufficient evidence without proof, that the party swore them; for there is no proof of the identity of the person, but by the comparison of hands, which is not sufficient evidence in a criminal case, for another man might personate me, and thereby subject me to the penalty of perjury. *Sed qu.? on proof of the witness's hand-writing.*

From what has been said, it is evident, Styl. 446.
that a *voluntary affidavit* before a master in *Chancery* is not evidence between strangers, because there is not any cross-examination, since it appears that there was not any cause depending, and therefore such evidence cannot, by any means, be admitted.

Depositions in *Chancery* are not of them- G. L. E. 67.
selves records, but they are oaths in a court of justice, and therefore it seems a witness swearing falsely, may be prosecuted, either at common law, or upon the statute, because this is perjury in a court of justice.

A man may also be indicted for a false 1 Sid. 454.
oath in the *Ecclesiastical* Court, or in the 1 H. P. C.
county court, at common law, but not upon 173.
the statute, for the statute expressly mentions that it must be a court of record, in which the perjury is committed, to become punishable within that law; but a perjury in any court that hath authority to examine the cause in relation to which the perjury is committed, may be punished at the common law; for it were preposterous that authority should be given by the law, to a court to examine upon oath, and that the law should not

punish the violation of that oath; but it seems if the court hath not any authority to examine the cause, then such perjury cannot be punished, for an oath, taken *coram non judice*, is not an oath in law; for the law cannot take any notice of an oath, but where it gives an authority to administer that oath; and if there be no lawful power to tender an oath, it is but an insufficient swearing, as an oath not taken by lawful authority, must be an oath not regarded by the law, and therefore not punishable, as the lawful oath is.

1 Vent. 370. 1 Mod. 166.

Depositions taken in the *spiritual* court in a cause relating to lands, cannot be read, because they are no oaths at all, in as much as the spiritual courts have no authority to take depositions relating to lands; but it seems they may be read when taken in a cause in which they have authority, as far as relates to that cause, in as much as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record.

1 Sid. 454. March. 120. Styl. 10.

A man promises that in consideration the plaintiff would bring two witnesses to swear to his debt, before a justice of peace, he would pay it, and the plaintiff says that he did bring two witnesses; and this oath, though *extra judicial*, and though the justice had no authority in the matter, was held a good consideration, for the oath tending to a decision of the right, was not held to be contrary to the law of God, and therefore the party might assume upon that consideration; but it is not such an oath as the law takes notice of, to punish as perjury.

1 Mod. 166.

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A deposition, regularly taken upon a bill and answer in *Chancery*, shall be evidence against the party to the suit, *or any who claim under him*, if the bill and answer are proved to be filed. 1 Keb. 685. 4 Mod. 146. 1 Sal. 279.

Though the bill was dismissed for want of equity. Ca. Ch. 175. per Holt. 7 W. 3.

So if it be proved that a bill and answer were filed, by the Six Clerk's Book, by mentioning them in the inrolment of the decree, it is sufficient, though they are now lost. R. 5 Mod. 211.

So an *exemplification* of an antient deposition was allowed where the records were burnt, though the bill and answer were not recited; for the recital was not usual before 1630. 2 Keb. 31.

Unless in the cases before excepted, the depositions of a living witness shall not be read though he afterwards becomes interested, whereby he is disabled to be a witness.* 1 Sal. 286. *Vide 2 Ver. 700. 1 P. W. 288, &c. 1 Str. 101. v. infra. R. 2 An. 1 Sal. 286.

Baker v. Lord Fairfax. Stra. 101.

Nor against him who is no party to the suit, *nor claims under one*. Hob. 112. 2 Rol. 679. l. 35.

Nor for a stranger, against a party to the suit; for, not being evidence against him, it shall not be allowed for him. R. Hard. 472.

Nor for a stranger to the suit against a purchaser under the party; though the cause there was of the same nature as now. Hard. 22.

So if taken *ex parte*, without answer to the bill, though the bill was *ad examinandum in perpetuam rei memoriam*. 2 Ion. 164. R. Ray. 336. Dub. 1 Sal. 279. Sho. 363.

The deposition of a person who was formerly a witness, but is now become interested as executor, and whose deposition was taken after making the will, cannot be admitted. More v. Ellis Freeman. H. 1725. Bunb. 205.

Parol evidence shall not be admitted to explain a deposition. Wilson. v. Poulter. H. 1. G. 2. Str. 794.

Depo-

Benſon v. Olive. M. 5 G. 2 Str. 920.

Depoſition, though taken 50 years before, cannot be read without ſome account of the witneſs's death; or that he cannot be heard of, on inquiry.

Tireman v. Henwell. T. 9. G. 2. B. R. H. 306.

No examination ſhall be read, though ſigned by a magiſtrate, unleſs ſigned by the party.

Barnes 222, 228.

The court will not give leave for witneſſes, priſoners in *execution*, to be examined, and their depoſitions read in evidence, without conſent.

The queſtion in the caſes in *Barnes* was, if * the warden could defend himſelf againſt an action for an eſcape? It ſeems ſtrange ſuch a queſtion ſhould ariſe. Yet ſeven judges were of opinion the *Ha. Cor.* would not excuſe. *Five* judges *contra.* Can it be ſaid that the ſubject is not intitled to the benefit of the teſtimony of a material living witneſs, becauſe he happens to be in execution? If his depoſition cannot be read, ſurely the ſpirit of the Engliſh law is ſuch as to authoriſe an *Ha. Cor. ad teſtificand.* And if the law doth authoriſe it, the *Habeas* muſt be a defence. But we conceive, there is not now any doubt, and that it is every day's practice to bring up a priſoner with an *habeas corpus.*

* A priſoner in execution was brought up to a court of niſi prius, by *habeas corpus ad teſtificandum.*

[5.] *Of Affidavits*, in *Equity*, and *Law*.

ANALOGOUS to an anſwer in Chancery, is a man's own voluntary affidavit, which may alſo be given in evidence againſt him, but then the proceedings in which this affidavit did ariſe, muſt regularly be given in evidence, and the reaſon why the proceedings muſt be given in evidence is, to prove the identity of the perſon, for to prove an affidavit ſworn is not ſufficient, as it may be ſworn by fraud and contrivance, *i. e.* by the perſon being perſonated by ſome body elſe, and therefore to bring home the proof to the perſon, you muſt prove the occaſion of the ſwearing, for it is not to be ſuppoſed that any man without ſome occaſion or other, would make ſuch an affidavit. *Sed Qu.* on proving his hand-writing? G. L. E. 52. Brochman's Caſe. Trin. Aſſ. 1701. per Gold. 1 Str. 35.

A bill was brought by creditors againſt an executor, to have an account of the perſonal eſtate: the executor ſets forth by his anſwer, that there was 1100l. left by the teſtator in his hands, and that coming afterwards to make up his accounts with the teſtator, he gave bond for 1000l. and the other 100l. was given him as a gift for his trouble and pains taken in the teſtator's buſineſs, and there was no other evidence in the caſe, that the 1100l. was depoſited, but merely by the executor's own oath; and it was argued that the anſwer, though it was put in iſſue, ſhould be allowed, ſince there is the ſame rule of evidence in equity as at law; and therefore if a man was ſo honeſt as to charge himſelf, when he might poſitively G. L. E. 52. Cites Anon. Hill. Vac. 1707. per Cowper.

positively have denied it, and no testimony could have appeared, he ought to find credit where he swears in his own discharge.

But it was answered and resolved by the court, that when an answer was put in issue, what was confessed and admitted, need not be proved, but it behoved the defendant to make out by proofs, what was insisted upon by way of avoidance; but this was held under a distinction, *viz.* where the defendant admitted a fact, and insisted on a distinct fact, by way of *avoidance*, there he ought to prove the matter of his defence, because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him so far as to pass for true, whatever he says in *avoidance*; but if it had been *one* fact, as if the defendant had said the testator had given him 100l. it ought to have been allowed, unless disproved, because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it; but it was urged that here the probability was on the defendant's side, because the testator did not take a bond for this sum, as for the residue, but the Chancellor said there was some presumption in that, but not enough to carry so large a sum, without better attestation.

Query. How prove a negative?

3 Mod. 116, 117. In an information for perjury, an answer may be given in evidence, without any person to prove that the defendant swore it, for the identity may be proved by many things out of the answer itself; besides, the party is obliged to sign his answer, and the perjury may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof, that out of the answer

G. L. E. 54.

itself

itself evince the identity of the person. *Qu.* As to comparison of hands.—Vide infra.

But that the comparison of hands only should be a proof in a criminal prosecution, was never law but only in the time of *K. I.* and the distinction has ever been taken, that the comparison of hands is evidence in *civil* † and not in* *criminal* cases; the reason why the comparison of hands is allowed to be evidence in *civil* matters is, because men are distinguished by their hand-writing as well as by their faces, for it is very seldom that the shape of their letters agree, any more than the shape of their bodies, therefore the comparison of hands serves for a distinction in civil commerce, for the likeness does induce a presumption that they are the same, and this presumption is evidence 'till the contrary appears; for every presumption that remains uncontested, hath the force of evidence, as a light proof on the one side will outweigh the defect of proof on the other; but in criminal prosecutions the presumption is in favor of the defendant, for thus far is to be hoped of all mankind, that they are not guilty in any such instances, and the penalty enhances the presumption; now the comparison of hands is no more than a presumption, founded only on the likeness, which may easily fail, because they are very subject to be counterfeited; therefore when the comparison of hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing.

G. L. E. 54.

G. L. E. 54.

† Query.

* 2 Hawk. P. C. 431. Lord Raym. 39, 40. State Trials 3 vol. 892, 893. 4 vol. 271, 272. 6 vol. 418.

This is the reasoning in G. L. E. 54.

The preceding reasoning, relative to the comparison of hands, is given, because it is rather curious, shews what antient notions upon the subject were, and because we be-

lieve

lieve, Lord *Ch. B. Gilbert* was the author; but, with submission to so great an authority, comparison of hands is not now admitted, even in civil proceedings.

1 Sid. 418. 19. In an information for perjury, the perjury assigned was in the defendant's answer, that he received no money: exceptions were taken to that answer for insufficiency: the defendant in a second answer, said, *that he received no money 'till such a day:* on the trial of the information, it was held, that nothing should be assigned for perjury that was explained in the second answer; for the first answer shall be charitably expounded according to what appears to be the party's sense in the second answer; and the court would rather intend there was some oversight in the draft, and that it was afterwards amended in the second answer, than suppose the party to be guilty of manifest and corrupt perjury.

G. L. E. 56. 1 Sid. 419. Where a man is sworn in Chancery to answer directly to his knowledge, perjury cannot be assigned in any thing which is not within his knowledge, as upon his belief, &c. for what he swears on his belief, is not within the compass of his oath.

But where a man swears falsely, though he guards his expression, by saying, according to the best of his *belief*, if it can be clearly proved by two witnesses that he must have known the contrary at the time of putting in his answer, he may be convicted of perjury.

Of voluntary Affidavits.

G. L. E. 56. There is a very great difference between the evidence of an *answer*, and that of a *voluntary affidavit.*

An

An anſwer cannot be given in evidence, without producing the bill; becauſe without the bill there does not appear to be a cauſe depending; but if there be proof by the proper officer, that the bill has been ſearched for diligently, in the office, and cannot be found, there the anſwer hath been allowed to be read without the bill; and this Lord Chancellor *Broderick* allowed, though the loſs of the bill was not proved by the proper officer, but by the clerk only, who wrote in the office, and ſwore he ſearched carefully with the officer, and could not find the bill.

Id. Cites Michaelmas Term 1714. in Canc. inter Roch. & Rix, & al. Adminiſtrators of Howard.

An anſwer is proved by ſhewing the allegations in the court, *viz.* by ſhewing the bill which is the charge, and the anſwer which is as it were the defence to the bill; and this in civil caſes ſhall be intended to be ſworn *, becauſe the proceedings upon ſuch defence are upon oath: now ſince the proceedings of any Court of Judicature within the kingdom, are good evidence in other courts, and the proceedings in this caſe are upon oath, it follows of conſequence, that in all civil caſes the anſwer is to be taken as an oath, without any further proof but from the proceedings in the cauſe.

G. L. T. 56. Cites Hall. Aſſ. 1702.

* Query, If there muſt n[illegible] be a Jurat, a[illegible] the hand-wri[illegible] ing of the perſ[illegible] who adminiſtered the oath, and ſigned the Jurat, proved [illegible]

But a *voluntary affidavit* is not part of any cauſe in a court of juſtice, and therefore it muſt be proved to be ſworn; for if you only prove it ſigned by the party, the proof goes no farther than to ſuppoſe it in the nature of, or equivalent to, a note or letter, and as ſuch, you may give it in evidence without farther proof; for a note or letter is a bare *acknowledgment* under the hand of the party, and this is no more, unleſs you alſo prove it to be ſworn, for it cannot be preſumed to be ſworn,

3 Mod. 36 expreſsly.

not being filed as an oath in a court of justice.

Such are affidavits made before a master in Chancery, by the vendor of an estate, in satisfaction of the purchaser, that the estate is free from all charges and incumbrances.

G. L. F. 57. Cites Vicary's Case in the Exchequer.

In an action of covenant against two, the affidavit of one of them was given in evidence, as an *acknowledgment* of them *both*, because the acknowledgment of one, where they had a *joint interest*, was to be looked upon as a truth relating to both; and it was left to the jury to consider how far it was evidence against the other.

3 Mod. 116.

The second difference between an *answer* and a *voluntary affidavit* is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; because the answer is an allegation in a court of judicature, and being matter of public credit, a copy of it may be given in evidence, for the reason formerly mentioned; but a voluntary affidavit hath no relation to any court of justice, and therefore is not intitled to public credit, and being a private matter, the affidavit itself must be produced as the best evidence.

Style 446.

It should be observed, that the voluntary affidavit of a *stranger* can by no means be given in evidence, because the opposite party had not the benefit of a cross-examination.

[6.] *Of proceedings* in the *Spiritual*, and other Courts, *&c.*

PROCEEDINGS in the *spiritual* courts, are in cases *matrimonial* and *testamentary*, and all other ecclesiastical causes. How these courts gained jurisdiction in causes *testamentary*, which was originally of temporal cognizance, is not here to be considered further than is necessary to determine the weight of credibility that is to be given to their sentences. The way of authenticating testaments by the civil law was this; the testator and his witnesses subscribed the will, bound it up, and sealed it with their seals, which after the decease of the testator, was opened in the presence of the *prætor*, and he delivered copies of the will, and kept the original in a public treasury; and from hence it is, that the spiritual courts keep the original will, and give out a *probate*, which is only a copy of the will under their seals. G. L. E. 71.

But originally among the *Germans*, the *goods*, as well as the *feud* itself, belonged to the Lord; afterwards it was thought fit that the *feudary* should dispose of his goods, and then the will was proved in the country courts, before the alderman and bishop; and if any man died intestate, the goods were distributed among his kindred; but after the conquest, the probate of the will and the commission of administration was indulged to the bishop, (who never had it in the times of the empire,) under pretence that provision would be better made for the souls of the deceased, but they G. L. E. 72.

are not to exceed their commiſſion, therefore they muſt confine themſelves to the bequeſt of the *perſonal* eſtate, for the feud was not deviſable until the 32 *H.* 8.

1 Mod. 231. 2 Stra. 960, 961 A *ſentence* in the *Eccleſiaſtical* Courts, may of courſe be given in evidence, in caſes where they have cognizance, for their judgments muſt be of authority, where the law gives them a juriſdiction; as it would be very abſurd that the law ſhould give them a juriſdiction, and yet not ſuffer what is done by virtue of that juriſdiction, to be a full proof, for that would be to ſuppoſe they were incompetent judges where they had juriſdiction.

R. 2 Rol. 679. l. 25. 2 Mod. 231. A *ſentence* in the *Spiritual* Court, in a matter within their cognizance, ſhall be evidence of the *right* to the thing there decreed: as a ſentence for *tithes*.

Per Trevor, 9 Ann. inter Wheeler and Lowth. So, a ſentence in the *admiralty*, which condemns goods as piratical, in *trover* for the ſame goods, upon the libel and anſwer produced.

Per Trevor ibidem. Or without producing the libel, if it be not found in the office, nor uſually filed there.

3 Com. Dig. 234 So, a *probate* of a teſtament for *perſonal* eſtate, and a grant of *adminiſtration*.

Ibid. — So, a judgment in a *court-baron*, *hundred*, or *county court*, with proof of the proceedings upon which the judgment was given.

Clews. v. Bathurſt. H. 7. G. 2. Str. 960. Hatfield v. Hatfield. in Parliament, 1725. Str. 961. B. R. H. 11. Sentence in the *Spiritual* Court, in a cauſe of *jactitation*, is concluſive evidence againſt a *marriage*, though there is an appeal entered, and though ſentence was given after iſſue joined at common law.

Da Coſta v. Villa Real. H. 7. G. 2. Str. 961. B. R. H. 18. Sentence in a *Spiritual* Court in a cauſe of *contract*, is concluſive evidence, on *non aſſumpſit* pleaded, in an action on contract of *marriage*.

Burton v. Fitzgerald. T. 10. G. 2. Str. 1078. Sentence of a *foreign admiralty*, condemning a *ſhip* as unfit, cannot be read in an

action

action on the *charter-party*, which is a contract under seal at land.

A *Duplicate* of an insolvent debtor's discharge at the sessions, is evidence of his discharge. Gillam v. Stirrup, T. 8. G. 2. B. R. H. 145.

But not of any fact which is the foundation of their jurisdiction. Ibid. Savage v. Field. M. 9 G. 2. B. R. H. 186.

If it recites that due notice was given, and the person who gave the notice is dead, it shall be evidence that due notice was given. Ibid.

If a man sued, and taken in execution in a court of *conscience*, brings trespass, *&c.* for it, he shall have liberty to inspect the books, as far as relates to the suit against him. Wilson v. Rogers. M. 19. G. 2. Str. 1242.

Sentence in the *Ecclesiastical* Court, for *fornication*, *&c.* in a criminal way, is not evidence against the *issue*; otherwise, if a sentence on the point of the *marriage*, and no collusion. Brownsword v. Edwards. H. 1750. 2 Vezey. 243.

Two allowances in *eyre*, temp. *Ed.* 1. and judgment in trespass, temp. *Ed.* 3. are not *conclusive* evidence of a right to wreck; and usage for 92 years last is stronger. Biddulph v. Ather. T. 28 & 29. G. 2. 2 Wils. 23.

A condemnation in a foreign *attachment*, which appears to be subsequent to an action in *C. B.* is no evidence. Barnes 195.

[7.] Of *Rolls of Courts Baron, &c.*

THE rolls of courts baron, or the copies of them, are public writings, though not records, for those courts are courts of justice, though they are not of record.

G. L. E. 76. cites Hil. Ass. 1701.

The reason why the court rolls, or copies of them, are evidence is, because they are the public rolls, by which the inheritance of every tenant is preserved, and they are the rolls of the manor court, which was antiently a court of justice relating to all property within the district.

B. N. P. 247. 1 Ken. 307, 320. Comb. 138.

A copy of a court roll under the steward's hand, is good evidence to prove the copyholder's estate.

Comb. 327. 12 Mod. 24.

So an examined copy of the court roll is good evidence, if sworn to be a true one.

G. L. E. 79. Jenkins and Baker, per Tracy, 1705

Where copyhold rolls made mention of a surrender to the use of the tenant's last will, and then *A.* was admitted as devisee under the will, this was ruled to be no evidence of the seisin or title of *A.* without the will itself, because the land doth not pass by the surrender, without the will, and therefore the will itself must be shewn as the best evidence of *A.*'s possession and title.

[8.] Of

[8.] Of *Regiſters*, &c.

THE regiſter is good evidence, or a copy of it: the regiſter began in the 30 *H.* 8. by the inſtigation of the Lord *Cromwell*, who at that time was veſted with all the authority that the pope's legates formerly had, under the title of *Vicar-General* to the King; and all wills that related to property above the value of two hundred pounds, were to be proved in this court, and therefore it ſerved his purpoſe to ſet on foot a regiſter of all perſons that were chriſtened and buried; and this might be very well appointed by the King's authority, as ſupreme head of the church, ſince chriſtening and burying are eccleſiaſtical acts; and when a book is appointed by public authority, it muſt be public evidence; this was afterwards confirmed by the injunction of *Edward* 6. and the particular manner of regiſtering appointed, as that the regiſtering ſhould be in the preſence of the parſon and church-wardens on *Sunday*, and that the book ſhould be kept locked in the church, to which the vicar and church-wardens were to have keys.

G. L. E. 76. cites Hill. Aſs. 1700. 2 Sid. 71. Godol. 145. Noy, 146. 1 Brownl. 207. Godol. 164. 2 Str. 1073.

Upon an indictment for entering a falſe marriage in the regiſter book, the defendant was fined two hundred marks; for ſince the regiſter is public evidence, it muſt be guarded by the law, that it be not counterfeited.

2 Sid. 71, 72. V. Stat. 26. G. 2. c. 33.

This is now by the ſtatute in the margin made felony, without benefit of clergy.

B. N. P. 247. The register of christenings, marriages, and burials is good evidence, or the copy of it, nay, proof, *vivâ você*, of the contents of it, without a copy, has been admitted; yet the propriety of such evidence may well be doubted, because it is not the best evidence of which the nature of the thing is capable: *I conceive it is not evidence; and in daily practice, even an abstract is rejected.*

2 Str. 1073. Though it appear in evidence that the register was made from a day book, kept by the minister for that purpose, yet the day book will not be admitted to contradict the entry B. N. P. 247. in the register, *ex. gr.* to prove a child base born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate.

[9.] Of

[9.] Of the *Pope's Licence* and *Bull.*

THE Pope's licence without the King's has been held good evidence of an *impropriation*, becauſe antiently the Pope was conſidered as ſupreme head of the church, and therefore he was held to have the diſpoſal of all ſpiritual benefices, with the concurrence of the patron, without any leave of the prince of the country; and theſe antient matters muſt be admitted according to the error of the times in which they were tranſacted. A Pope's bull is no evidence on a general preſcription to be diſcharged of tithes, becauſe that ſhews the commencement of ſuch a cuſtom, and a general preſcription ſhews that there was no time or memory of things to the contrary, ſo that the bull itſelf contradicts ſuch preſcription. G. L. E. 77. Palm. 427. Palm. 38.

But the Pope's bull was evidence on a ſpiritual preſcription, when it was only laid that the lands belonged to ſuch a monaſtery, which was diſcharged of tithe at the time of the diſſolution; for if ſo, they continue diſcharged by act of parliament. Ibid.

[10.] Of *Public Books*, &c. such as *Domesday Book*—Books in the *Herald's* Office—The *Navy* and other *Public Offices*—*Surveys*—*Terriers*—*General History*—and *Inventories*, &c. taken by *Sheriffs*.

*Of Domes-day book * and other books, &c.*

Hob. 188. IF the question be, whether a certain manor be *antient demesne* or not, the trial shall be by *domes-day* book, which shall be inspected by the court. *Antient demesnes* are the socage-tenures that were in the hands of *Edward* the Confessor, and which *William* the Conqueror, in honour of him, endowed with several privileges: *Domes-day* book was a terrier or survey of the King's lands, which was made in the time of the Conqueror, and which ascertains the particular manors which had this privilege.

Gregory v. Withers, H. 28 Car. 2. B. N. P. 248. In ejectment for the manor of *Artam*, the defendant pleaded *antient demesne*, and when *domes-day book* was brought into court, would have proved that it was antiently called *Nettam*, and that *Nettam* appears by the book to be *antient demesne*; but he was not permitted to give such evidence, for if the

* There have been various opinions as to the meaning of this name. In the *Celtic* language *dom* signified a judge, *ey* law, *d'ey* of law. Therefore *Domes-day book*, a book of direction for the judges of the law.

Judge Law
Dom's D'Ey- book, Judge's Law-book.

name

name was varied, it ought to have been averred on the record.

To know whether any thing be done in or out of the *ports*, there lies in the *Exchequer* a particular ſurvey of the King's ports, which aſcertains their extent. B. N. P. 248. Term. Paſch. 1701. In Scaccario.

An old *terrier* or *ſurvey* of a manor, whether eccleſiaſtical or temporal, may be given in evidence, for there can be no other way of aſcertaining the old tenures or boundaries. B. N. P. 248.

A *terrier* of *glebe* is not evidence for the parſon, unleſs ſigned by the church-wardens as well as the parſon, nor then neither, if they be of his nomination; and though it be ſigned by them, yet it ſeems to deſerve very little credit, unleſs it be likewiſe ſigned by the ſubſtantial inhabitants; but in all caſes it is ſtrong evidence againſt the parſon. Ibid.

Rolls or *ancient books* in the *Herald's office*, are evidence to prove a *pedigree*; but an extract of a pedigree proved to be taken out of records, ſhall not, becauſe ſuch extract is not the beſt evidence in the nature of the thing, as a copy of ſuch records might be had. 2 Jones, 224.

Camden's Britannia would not be evidence to prove a particular cuſtom; but a general hiſtory may be given in evidence to prove a matter relating to the kingdom in general; as in the caſe of *Neal* and *Jay*, chronicles were admitted to prove that King *Philip* did not take the ſtile in the deed at that time, *Charles V.* of *Spain* not having then ſurrendered. Ca. K. B. 85. Salk. 281.

The *regiſter* of the *Navy office*, with proof of the method there uſed, to return all perſons dead, with the mark *Dd.* is ſufficient evidence of a death. B. N. P. 249. cites Ex dem. Whitcomb P. 6 An. C. B.

An

B. N. P. 249. 2 Keb. 277.

An *inventory* taken by a ſheriff on an execution, is evidence between ſtrangers, to prove the quantity and value of the goods; for the law intruſting him with the execution, muſt truſt him throughout.

G. L. E. 78. Yates and Harris, Hil. Aſs. 1702.

An old *map* of lands allowed evidence, where it came along with the writings, and agreed with the boundaries adjuſted in an antient purchaſe.

[A.] II. (I.) Of private written evidence.

(i.) *Writings* under *Seal*.

(ii.) *Writings* without *Seal*.

(i.) *Writings* under *Seal*.

They are *Charters* and *Deeds* between party and party; *Deeds Poll, Obligations*, and *Bills Penal*.

(a.) Of Charters and Deeds under Seal.

ANY *charter* or *deed*, under *seal* of the party, shall be allowed for evidence. 3 Com. Dig. 281.

A *charter* is taken in our law for written evidence of things done between man and man: whereof *Bracton* says thus, *Fiunt aliquando donationes in scriptis, sicut in* chartis, *ad perpetuam rei memoriam, propter brevem hominum vitam, &c.* And *Britton* divides *charters* into those of the King, and those of private persons. L. 2. c. 26. f. 39.

Charters of the King are those whereby the King passeth a grant to any person, or body politic, as a *charter* of exemption, of privilege, *&c. charter of pardon*, whereby a man is forgiven a felony, or other offence against the King's crown and dignity; and of these there are several sorts, *viz. Charta pardonationis utlagariæ*; *Charta pardonationis se defendendo, &c.* and others mentioned in the register of writs. *Charter of the forest*, wherein the laws of the forest are comprised, such as the *charter of Canutus*, &c. Reg. 287, 288, &c. Kit. 314. Fleta. l. 3. c. 14.

Charters

Charters of private perſons are deeds and inſtruments for the conveyance of land, *&c.* and the purchaſer of land ſhall have all the *charters*, deeds, and evidences as incident to the ſame, and for the maintenance of his title.

Co. Lit. 6. *Charters* belong to a *feoffee*, although they be not ſold to him, where the *feoffor* is not bound to a general warranty of the land; for there they ſhall belong to the *feoffor* if Mo. Ca. 687. they be ſealed deeds or wills; but other charters go to the tertenant. The charters belonging to the *feoffor* in caſe of warranty the 1 Co. 1. heir ſhall have, though he hath not any land by diſcent, for the poſſibility of diſcent after. 1 Co. 1. b. & Vide 2 Com. Dig. 265, 6. If, however, a feoffment be made of land with warranty, the *feoffee* ſhall have court-rolls, *&c.* which concern the poſſeſſion only, and not the title.

G. L. E. 79. As to *deeds*, the general rule is, that where any perſon claims by a deed in the pleadings, there he ought to make a *profert* of it to the court; ſo where he would prove any fact in iſſue by a deed, in both caſes the deeds themſelves muſt be ſhewn.

(*b.*) *A deed conſiſts of three things.*

[1.] Of *ſealing* by the parties.

[2.] Of *delivery* to the party to whom the deed is made.

[3.] Of a *right* transferred, or *obligation* created.

(1.) The *ſeal* was very antient in the *Roman* and *Grecian* governments, and from them it came to the northern nations, who antiently paſſed all manner of right, by the actual tra-

dition of the thing itſelf; the ſeal followed from the invention of coins, and is a derivation from the ſame convenience; for as coins were invented as tickets, to facilitate the exchange of all manner of commodities, ſo when coin was wanting, or not ready for payment, tickets were given by impreſſion in wax, which paſſed inſtead of coin, and theſe impreſſions were made with great exactneſs of diſtinction, for they contained the arms, or ſome notorious ſymbol, of the perſon contracting; now when ſuch diſtinctions were taken up and found of uſe, they were at laſt required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no ſolemn contract without the diſtinction of the ſeal.

(2.) The *delivery* was always a ſolemn ſign uſed by the northern nations, in transferring of right, and as they antiently delivered the thing itſelf, and by that delivery made the alienation, ſo when contracts took place of the things themſelves that were to be delivered, they annexed the ſolemnity to the contract, and the contract was completed by the delivery, and from thence it became neceſſary that a delivery ſhould be made of all contracts.

(3.) In every contract there muſt be ſome *right* transferred, or *obligation* created, and therefore there muſt be apt words to ſhew what *right* was transferred, and to whom; to ſhew what *obligation* was created, and to whom: and the ſenſe and ſignification of the words muſt be expounded by the law, ſince it is the province of the law to determine the forms, ſolemnities, and operation of all manner

manner of contracts; for the operation and effect of a contract, cannot be determined but by the rules of law that are appointed as the measures of transferring right, and of creating obligations; and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure.

(c.) *Profert of Deeds.*

There must be a *profert* made of all solemn contracts in any action founded on such contracts.

1st. For the security of the subject, that what *right* is transferred, or what *obligation* is created, might be judged of according to the rules of law

2dly. Because all allegations in a court of justice, must set forth the thing demanded; now the thing demanded cannot be set forth without the instrument shewn, upon which the demand arises; for since the demand is by the instrument, there can be no demand at all without shewing that from which it arises.

Co. Lit. 226. Therefore parties to a deed cannot found any claim without shewing a deed to the court.

Co. Lit. 267. 10 Co. 92. Nor can privies in estate take any advantage of a deed without shewing it.

10 Co. 93. As if there be tenant for life, remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it, without shewing the deed, for since the right passed merely by the deed, to say

any

any person released without deed will not be a good plea.

When a man shews a title in himself, every thing *collateral* to that title shall be intended, whether it be shewn or not, for though the law requires an exactness in the derivation of the title, yet when that title is shewn, the law will presume all collateral circumstances in favour of right; for when lawful conveyances, which are made with care, and on consideration do appear, it would create too great nicety to require an exactness in the shewing of every *collateral* matter, and would tend to the intangling of right with too many difficulties, and therefore, by the benignity of justice, they shall be intended: besides, a matter *collateral* to a title, is what doth not enter into the essence or being of a title, but arises *aliunde*, so that there must be a good derivation of your right without it. 6 Co. 38. a.

As when a man declares of a grant or feoffment of a manor, the attornment shall be intended; for when a title is shewn to the manor, attornment of the tenant, which is *collateral* to that title, shall be intended 'till the contrary is shewn on the other side. Co. Lit. 310. Cro. El 401.

So in trespass, the defendant conveys the house in which, &c. by feoffment from *I. S.* and justifies damage feasant; the plaintiff replies, that *I. S.* before the feoffment made a lease to *I. N.* who assigned to him; the defendant rejoins, that the lease was made on condition that if *I. N.* assigned over without licence, by deed from *I. S.* that then *I. S.* should re-enter; the plaintiff surrejoins, that *I. S.* did give licence by deed, without any *profert* of the deed, and yet this surrejoinder was good, because the plaintiff's title was by 6 Co. 38. Bellamy's case, Cro. Jac. 102.

aſſignment of the leaſe from *I. N.* and conſequently the licence from *I. S.* is but a matter *collateral* to the aſſignment, and by conſequence the deed muſt be intended to be well and legally made, though it be not ſhewn to the court.

6 Co. 38. But if the matter be *collateral* to the plaintiff's title, then there is another difference, and that is where the deed is neceſſary *ex proviſione hominis*, and where it is neceſſary *ex inſtitutione legis*; for where the deed is neceſſary *ex inſtitutione legis*, there you muſt ſhew it, for it is repugnant that the law ſhould require a deed, and not put you to ſhew that deed when it is made; as if you are obliged to ſhew the attornment of a corporation, there you muſt ſhew a deed, in as much as corporeal bodies, by the rules of law, cannot act but by corporeal inſtruments; for the body conſiſts in agreement and union, by creation of law, by patents or inſtruments under ſeal, and there is no act of the aggregate body but in the ſame manner, ſo that there can be no attornment without a deed, and the law cannot allow the attornment of ſuch a body without it, therefore no attornment is ſhewn unleſs a deed is ſhewn alſo.

6 Co. 38. But when a deed is neceſſary *ex proviſione hominis*, there, when it is *collateral*, as in the caſe of the licence before mentioned, it need not be ſhewn, for the private act of the parties ſhall not control the judgment of law, that intends all ſuch *collateral* matters without ſhewing.

(*d.*) *Of*

(*d.*) *Of things that lie in* Livery, *and things that lie in* Grant.

There is a difference to be taken between things that lie in *livery*, and things that lie in *grant*; for things that lie in *livery* may be pleaded without deed, but for a thing that lies in *grant*, regularly a deed must be shewn. G. L. E. 84.

(1.) *Of things in livery.* It may not be improper to observe, that livery was the antient mode of conveyance, being a solemn delivery of land in sight of the inhabitants; and because this was done *coram paribus curiæ*, and the tenant ever after resided on, or continued in the possession of the land, it was reckoned the most notorious way of conveyance; and since this was the antient *Gothic* way, and because they reckoned it of itself most manifest, the solemnities of a deed were not necessary.

And therefore a man may plead that *I. S.* infeoffed him without saying *per indenturam*, and yet give the indenture in evidence, because the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is invested with the feud, and the indenture is only evidence of such feoffment. 2 Rol. Ab. 682.

But if a man pleads that *I. S.* hath infeoffed him *per fait*, whether a man may give a *parol* feoffment in evidence, hath been reasonably doubted, because he has bound himself to a *feoffment* by *deed*; and if the jury have only evidence of a *parol* feoffment, and yet find the issue that the feoffment was G. L. E. 85. 2 Rol. Ab. 682.

by deed, the verdict may be used by way of *estoppel* ever after, where in truth there was no such deed.

2 Rol. Ab. 682. So a demise may be made without deed, as well as a feoffment, for here the party hath the possession, and therefore the old way of contracting governed in this case; and so a man may plead a demise without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract which would be good *, whether there was any indenture or not; but if the demise were laid by indenture, it seems that a *parol* demise could not be given in evidence.

* If not contrary to the statute of frauds and perjuries. 29 Car. 2. c. 3. Vide infra.

Co. Lit. 352. *Livery* is also an *estoppel*, and is by *Coke* called an *estoppel in pais*, because it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony, for when solemnities are setled for transferring a possession, they ought to be held sacred by the law, for which reason a man is concluded from destroying that of which he himself is the author, or from impeaching that which is held as sacred to transfer all possessions.

Co. Lit. 225. Lit. § 365. Therefore if a defendant pleads the *livery* and *seisin* of the plaintiff, the plaintiff cannot reply that the *livery* was conditional, without shewing the deed, in as much as the plaintiff is estopped to defeat his own *livery* by a naked averment and *parol* evidence only.

Co. Lit. 226. Lit. § 366. But the jury are not *estopped* on the general issue, from finding such a conditional feoffment, for the jury are men of the neighbourhood, who are supposed to be present at the solemnity, and they are sworn *ad veritatem dicendam*, and therefore they cannot be *estopped* from finding the *truth* of the matter,

and

and consequently may exhibit the condition of the feoffment.

But since the use of such solemnities before the men of the country hath ceased, by allowing secret *liveries*, in the presence of two witnesses only, therefore, by the statute of frauds and perjuries, it is enacted, that no leases, estates or interest of freehold, or for a term of years, or uncertain interest (not being copyhold) shall be assigned, granted, or surrendered, unless it be by deed or note in writing, under the hand of the party or his agent, thereunto lawfully authorised in writing, or by act and operation of law; so that by this statute the ceremony of *livery* only is not sufficient to pass estates of freehold or terms for years; but it is not necessary to set forth such contract in the pleadings, for they are, as they were formerly, *feoffavit et demisit*.

29 Car. 2. c. 3.

Buck's case, Trin. 1701.

A man may plead a condition to determine an estate for years without deed, for this begins without any livery, and therefore the party is not *estopped* by any notorious ceremony from averring the condition.

Co. Lit. 225. Lit. § 365.

But where a man sets out a feoffment, the other party may reply, that it was by deed, and shew the condition, for then there is an *estoppel*, and so the matter is in equal balance, and therefore must be determined according to truth.

G. L. E. 88.

(2.) *Of things lying in* grant, and these are all *rights*, as *fairs*, *markets*, *advowsons*, and *rights* to *lands*, where the owner is out of possession; and these being *rights*, they cannot pass by investiture of the possession, because they cannot possibly be *delivered* over or *possessed*, and therefore they must pass by

Ibid.

 the

the next ſort of grants which hold the ſecond place, in point of ſolemnity, and that is by *grant* under the hand and ſeal of the party.

G. L. E. 88. Now a perſon that claims any thing lying in *grant*, muſt ſhew his deed from the party that had the original grant, or otherwiſe he muſt preſcribe in the thing he claims, and the preſcription being ſuppoſed immemorial, ſupplies the place of a grant.

10 Co. 93. He alſo that has a particular eſtate by the *agreement* of the parties, muſt ſhew not only his own conveyance, but the deeds paramount, for there can be no title made to a thing lying in *agreement*, but by ſhewing ſuch *agreement*; and the particular tenant ought to have a convenant for the production of the deeds, in as much as he has not any title, unleſs he can derive the eſtate that ariſes in *agreement* from the original grant.

10 Co. 93, 94. But where a perſon claims any eſtate, by particular *act* in *law*, there he may make his claim without ſhewing the deeds as tenant in *dower*, or by *elegit*, or *guardian* in *chivalry*, may claim an eſtate in a thing lying in *grant* without the deed; for when the law creates an eſtate, and yet doth not give the particular tenant the property of the deeds, it muſt be allowed that the eſtate be defended without them, otherwiſe the creation of the eſtate were altogether in vain.

Co. Lit. 225. So they may plead a condition without ſhewing the deeds, becauſe they claim an eſtate by *act* of *law*, and therefore are not *eſtopped* by the *livery*, for which reaſon they may claim an eſtate defeated by the condition without a deed; beſides, they are not ſuppoſed to have the deeds and muniments of the

the eſtate, and therefore, for the reaſon formerly given, may do it without deed.

But tenant by the *curteſy* cannot claim G.L.E. 90. cite
any eſtate lying in *grant* without deed, be- 10 Co. 94.
cauſe he has the property in, and cuſtody of, Co. Lit. 226. a.
the deeds in right of his wife, and that property cannot be diveſted out of him during the continuance of his eſtate.

Note, 10 *Co.* 94. does not warrant the diſtinction between tenant in *dower* and tenant by the *curteſy* generally, but only in the caſe of a *releaſe* made to the wife.

So alſo tenant by the *curteſy* cannot defeat Co. Lit. 226. a.
an eſtate of freehold, without ſhewing the deed, nor can the lord by *eſcheat* do it, without ſhewing the deed, for the act of *livery* is an *eſtoppel* that runs with the land, and bars all perſons to claim it by virtue of any condition, without the condition appears in a deed, for the notoriety and ſolemnity of the act is that which makes it obligatory on all perſons; ſo that they cannot impeach it without ſhewing a precedent title; for *livery* cannot be defeated but by ſhewing ſomething equally notorious; and ſince in both theſe caſes the cuſtody of the deeds reſides with them, they muſt ſhew the condition.

So that the general rule is, where any per- Co. Lit. 267.
ſon ought to have the cuſtody of the deeds, 10 Co. 94. b.
there where ſuch perſon is compelled to ſhew his title, he ought to make a *profert* of thoſe deeds to the court; for every man ought to keep his deeds, and cannot take advantage of his own negligence in loſing them; therefore in the caſe formerly put of tenant for life, the remainder in fee, and a releaſe is made to him in remainder, in ſuch caſe tenant for life ought to make a *profert* of the deed, for

in this case, they have both parts of the same feud, and therefore tenant for life is supposed to be equally intitled to the deeds, as he in remainder.

Co. Lit. 226. Styl. Reg 205. But where a person is an utter stranger to any deed, there in pleading he is not compelled to shew it, for where he is not supposed by the law to have the custody of the deeds, there he cannot be compelled in pleading to shew such deeds to the court, for that were to compel the party to impossibilities, which were a very unjust and unequitable law.

Co. Lit. 226. a. As if a man mortgageth his land, and the mortgagee leaseth the land for years, reserving a rent, and then the condition is performed, and the mortagor re-enters; the lessee, in bar of an action of debt, shall plead the condition and re-entry, without shewing the deed, for the lessee never was, nor could be intitled to the custody of the deed, and therefore it were altogether unjust to compel him to produce it.

Co. Lit. 226. So if a man bring a *præcipe* against *A.* he shall plead that he was only a mortgagee, and that the mortgage was performed, so that he hath no longer seisin of the estate, and this without shewing the deed; for upon performance of the condition the property of the deed was no longer in the mortgagee, but it ought to be re-delivered to the mortgagor, and the mortgagee having no longer any title to the deed, he may plead the condition without shewing it.

10 Co. 94. Query as to the action of debt, if the rent was due before the grant? So in an action of *waste*, or for arrears of rent, the tenant pleads a grant of the reversion and attornment; after such waste committed, or such arrears due, the tenant cannot shew the grant. *Causa qua supra.*

A deed

A deed inrolled muſt be offered to the court in pleading, though the deed be inrolled in the ſame court in which the plea is depending, as this is not a record, but a deed recorded; for a record muſt be the act of the court, and, therefore, the deciſions of juſtice by the court, which remain as precedents for future obſervations, are the records of the court. Letters Patent, which are the King's acts, are the higheſt ſort of records; but a deed inrolled is only a private act of the party, authenticated in court, and from thence this difference is drawn, that letters patent inrolled in the ſame court, or records of the ſame court, need not be proferred to the court, but a deed inrolled muſt; for all records that are public acts, and which remain for the direction of the court, in matters of judicature, muſt be taken notice of; and therefore they need but refer to it, with a *prout patet per recordum*; for the court will take notice of the courſe and orders of the court upon reference to them; but deeds are no more than the private act of the parties, authenticated by the court, and they do not remain for the direction of the court, but take advantage of the authority of it to give them credit; and therefore the court doth not take notice of them unleſs they are pleaded; but letters patent in another court, the court doth not take notice of, unleſs they are offered, for ſince they are not any of the records that are directory to this court of juſtice, it is not the office of the court to take notice of them, and therefore it is the duty of the parties to offer them, as they do all other allegations. 5 Co. 74. b. 10 Co. 92. 1 Stra. 520.

To

G. L. E. 93. To a deed acknowledged in court, a man cannot plead *non est factum*, for being done in court, the truth of the fact is so far to be credited, that he shall never deny the deed, but he may avoid the operation of it, by pleading *riens passa per le fait*, for that doth not impeach the credit of the court, in which it was acknowledged.

5 Co. 74; 75. Wymark's Ca. Since the term, (to avoid the entering up the several continuances of business) is reckoned as one continued law-day, deeds pleaded shall be in the custody of the law, during the whole term, being the day wherein they are pleaded, and being then before the court, any body may take advantage of them; but since they belong to the custody of the party, if a deed be not denied, it shall go back to the party, after the term is over, when nobody can take advantage of it, without a new *profert*; for then it is not before the court; and therefore the plaintiff in the *King's-Bench*, may take the advantage of a condition in a deed in his replication, because it was *et prædictus A. dicit*, as of the same term, but he cannot take advantage in his replication of a deed in the *Common Pleas*, because they enter an *imparlance* to another term; but where the deed comes in, and is denied, it remains in court for ever*, because that is the only point in debate, on which the decision of the court is founded, and therefore, like all other decisions, it must remain among the other records of the court; and because it is tied up to this court, and is impossible to be removed, it shall be pleaded in another court without shewing. *Sed Qu.?*

Qu. de hoc?

* Query, If the deed is ever actually brought into court. When a profert is made, oyer and a copy may be demanded, and if the cause is tried, it is, if denied, produced, proved, and returned.

Co. Lit. 226. 2 Strange 1136. 1198. As no party shall take advantage of his own negligence, in not keeping his deeds,

2 which

which in all cases ought to be fairly produced to the court, so his adversary shall not take any advantage of his wrongful detaining of them; for the one, by a violent taking away of the deeds, gives a just excuse to the other, for not having them at command, and no man can ever make any advantage of his own wrong; and therefore it is a good plea for one party to say, that, the other entered, and took away the chest wherein the deeds were.

In an action of debt upon a bond, it is matter of substance to make a *profert* of the deed, because this is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court. Cro. Jac. 32.

It is not matter of substance to shew *letters* of *administration*, for whether they are legally granted or not, belongs to the cognizance of the spiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, since it has different measures of judicature. 2 Saund. 402. 2 Str. 261. But a profert should be made of them, or the other party may demur, and shew the omission for cause.

(*e.*) *Evidence of Deeds.*

Of giving deeds in evidence to the jury; and here the general rule is, that where any thing is to be proved, the deed itself must be given in evidence, and not a copy of it; and the deed must be regularly proved by one witness at least. 10 Co. 92.

This is now to be understood where the ...ed is of a late date, for if the deed be of thirty years standing, (which now makes an antient deed) and the person to whom G. L. E. 95, Cites Mich. 1718. in the Exch. per curiam.

the

the deed was made, or thofe deriving under him, have been in poffeffion under the deed, fuch ancient deed fhall be read, without proof, though the witnefs to it be alive; and if the perfon to whom the deed was made hath been in poffeffion of the lands contained in the deed, fuch poffeffion fhall be prefumed to be under the antient deed, unlefs the contrary be proved.

B. N. P. 255. If the deed be thirty years old, it may be given in evidence without any proof of the execution of it. However, there ought to be fome account given of the deed, where found, &c. and if there be any blemifh in the deed by razure, or interlineation, the deed ought to be proved, (though above thirty years old) by the witneffes, if living, and if they are dead, by proving the hands of the witneffes, or of one of them at leaft, and alfo the hand of the party, in order to encounter the prefumption arifing from the blemifhes in the deed; and this ought more efpecially to be done, if the deed import a fraud; as where a man conveys a reverfion to one, and after conveys it to another, and the fecond purchafer proves his title; becaufe in fuch cafe the prefumption arifing from the antiquity of the deed is deftroyed by an oppofite prefumption; for no man fhall be prefumed guilty of fo manifeft a fraud.

Chattle and Pound, H. affize, 1701.

(1.) *Of the* deed *itfelf.*

G. L. E 96. *Firft*, the deed ought to be given in evidence, and not a copy only, for though as to records, copies are admitted in evidence, yet the law will not regularly allow it as to private deeds, for they are not within the

fame

ſame reaſon as copies of records, for a record is fixed in a certain place *, and therefore the original cannot be had, and conſequently a copy is the beſt evidence.

* For the uſe of every one who hath occaſion for copies.

But deeds are only private evidence, and not fixed or confined to a certain place, but are in the cuſtody of the party, and not of the law, and therefore they muſt be produced in evidence; for the law requires the beſt evidence of which the nature of the thing is capable, and the deed is much better evidence than a copy, for any raſure or interlineation which might vacate the deed, muſt appear in the deed itſelf, though not in the copy, and the very offering a copy, carries a preſumption, as if the original were defective, and therefore the copy is not to be admitted; beſides, ſince deeds are in the cuſtody of the party, the deeds themſelves muſt be produced, for a man cannot make his own fault in loſing of the deeds any part of his excuſe.

Query, If wilful negligence is not meant? Et vide poſt.

But there are ſome exceptions to this general rule.

1ſt. Where they prove the deeds themſelves to be burnt, for the proof of this will excuſe the non-production of the deeds to the jury; but, notwithſtanding a *profert* is neceſſary to the court, for there is ſuch conveniency in keeping to known rules, that they cannot be broken, though they tend to the miſchief of particular perſons; and there cannot be a more convenient rule, than that the *cauſe* of every *complaint* ought to be ſhewn to the court; but the jury muſt go according to the *evidence* of the *fact*.

10 Co. 92, 3. 1 Mod. 4.

Now to prove the import of the deed, that it was in ſuch an houſe, and that the

houſe

houſe was burnt, is the beſt evidence that can be had of ſuch deed, and gives reaſonable grounds for the jury to find it.

(2.) *Of the* copy *of a deed.*

1 Mod. 266.

Secondly, a copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the beſt evidence, as the preſumption that oppoſes the copy is, becauſe the original deed is, or ought to be in the hands of the party who would produce the copy; now that preſumption is deſtroyed, where the plaintiff proves the deed itſelf to be in the hands of the defendant, for then it cannot be preſumed that there was any better evidence, or that there was any interlineation that induced the plaintiff to conceal it, for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original.

Query, If the plaintiff ſhould not demand the deed, and if refuſed, give defendant notice to produce it, to intitle himſelf to give the copy in evidence?

(3.) *Of* proof *of the* copy *of a deed.*

1 Mod. 4.

Thirdly, but the copy of a deed muſt be proved by a witneſs that compared it with the original, for otherwiſe there would not be any proof of the truth of the copy, or that it had any relation to the deed, unleſs ſome perſon prove its compariſon with the original.

Vaugh. 77.

Where the effects or contents of a deed are proved, and where the deed is afterwards given in evidence, and they diſagree, there the deed itſelf ſhall control the other evidence.

So

So it is where the jury on a ſpecial verdict do collect the contents of a deed, and yet afterwards do find the deed *in hæc verba*, the court in ſuch caſe is not to regard the collection they have made of the ſubſtance of the deed, but the deed itſelf, for that collection derives its authority from the deed, and therefore muſt of itſelf fail and come to nothing, when it is contrary to the deed of which it is a collection.

Where the poſſeſſion has gone along with a deed for many years, there a very old copy of the deed may be given in evidence, with proof that the original is loſt; and that is according to the rule of the civil law, *Si vetuſtate temporis et judiciariâ cognitione ſint Roboratæ*, for poſſeſſion could not be ſuppoſed to go along in the ſame manner, unleſs there had been originally ſuch a deed, and ſo executed as the copy mentions, and the copy cannot be ſuppoſed to be offered in evidence, only to avoid a ſight of the original, ſince it is ſo antient that the antiquity alone prevents all ſuſpicion of its being counterfeit, and the antiquity is known from the antientneſs of the poſſeſſion. But, G. L. E. 98.

Query, Whether ſuch a copy ſhall be received without proof of its being a true copy, by compariſon with the deed itſelf?

(4.) *Of the* inſpeximus *of a deed.*

Fourthly, the *inſpeximus* of a deed inrolled ſhall be given in evidence, where the deed needs inrollment; for there the inrollment is the ſign of the lawful execution of ſuch deed, and the officer appointed to authenticate ſuch deeds by inrollment, is alſo empowered 5 Co. 54. Page's caſe. Style, 445. 1 Keb. 117. Tri. per Pais, 355.

powered to take care of the fairneſs and legality of ſuch deeds, and therefore a copy of ſuch inrollment * muſt be ſufficient, for when the law hath appointed them to be made public acts, the copy of ſuch public acts ſhall be like all other public acts, a ſufficient atteſtation.

* i. e. o the inrolled deed.

5 Co. 54. Page's caſe. Style, 445. 1 Keb. 117. Tri. per Pais, 355.

But where a deed doth not need inrollment, there, though it be inrolled, the *inſpeximus* of ſuch inrollment is not evidence, becauſe, ſince the officer hath not any authority to inroll it, ſuch inrollment cannot make it a public act, and conſequently cannot intitle the copy to be given in evidence, for ſuch practices might be uſed to very ill purpoſes; as if a deed were doubtful, it were but to inroll it, and offer the copy or *inſpeximus* of it in evidence, and thereby avoid the giving in evidence a deed that might be very ſuſpicious.

Styl. 445.

But the *inſpeximus* of an antient deed may be given in evidence, though the deed do not need inrollment, for an antient deed may be eaſily ſuppoſed to be worn out or loſt, and the offering the *inſpeximus* in evidence does not induce a ſuſpicion that the deed is doubtful, for it hath a ſanction from antiquity, and if it had been ill executed, it muſt be ſuppoſed to have been detected when it was newly made.

G. L. F [illegible]ct.

As to the *ſecond* part of the rule, the deed muſt be proved to the jury by one witneſs at leaſt, for though the deed be produced under hand and ſeal, and the hand of the party that executed the deed be proved, yet this is not full proof of the deed, for the *delivery* is neceſſary to the eſſence of the deed, and the deed takes effect from the *de-*

livery, ſo that unleſs the *delivery* be proved; there is not perfect proof of the deed, and there cannot be any proof of the *delivery* but by a witneſs who ſaw it.

To this rule there are, however, ſeveral exceptions.

Firſt, if the deed be thirty years old; that deed may be given in evidence, without any proof of the execution of it. G. L. E. 102. Cites Trin. Aſſ. in Kent 1700. Tri. per Pais, 165.

Gilbert ſays *forty* years, and reaſons upon the ſubject, taking into conſideration the length of the life of man; but that reaſoning it is not neceſſary here to ſtate, becauſe the practice is now fully eſtabliſhed, and univerſally known. Vide ante, Introd.

It hath however been ruled, that if a deed be forty years old, and poſſeſſion hath not gone along with it, ſome account ought to be given of the deed, becauſe the preſumption fails that was eſtabliſhed in behalf of ſuch antient deeds, when there is not any poſſeſſion, for it is no more than old parchment if there is not any account given of its execution. G. L. E. 102. Cites Aſſ. 1702, per Haſſet.

If there be any blemiſh in the deed, by razure or interlineation, the deed ought to be proved, though it be forty years old, if the ſubſcribing witneſſes are living, by thoſe witneſſes, or at leaſt one of them; but if the witneſſes are dead, the hands of the witneſſes ought to be proved: as to the antiquity of a deed, there muſt be (as it is ſaid) a preſumption in favor of it, when worn out of the memory of the witneſſes; yet that preſumption is encountered by another preſumption, from the blemiſhes of the deed itſelf, and therefore the credit of the deed ought to be reſtored by the proof, as far as can be, G. L. E. 102. Cites Trin. Aſſ. 1700. in Kent. Query, If the hands of the parties alſo ought not to be proved, if there is any one to be procured who can make ſuch proof?

of the execution of it. *Query, If proof of the hand writing of one witness is not sufficient? Vide supra (e.) & post (i.)*

So if a deed imports a fraud. *Vide supra* (1.)

1 Rol. 192. Tri. per Pais, 209. If a deed of *feoffment* be proved, and the possession has gone along with the deed, there *livery* shall be presumed, though it be not proved, for when there has been possession in the manner that the deed sets forth, it founds a very strong presumption, that the possession was delivered in that manner; for that there should be a contract to transfer possession, and that possession should go according to that contract, are such concurring circumstances, as cannot be accounted for, unless the possession was transferred according to the contract, and consequently *livery* and *seisin* must be supposed by the jury.

Pl. Com. 6, 7. But if possession hath not gone along with the deed, then *livery* must be proved upon the *feoffment*; for since *livery* is to give the possession on the deed, where no possession is, the presumption must be that there was not any *livery*, and consequently *livery* must be proved, to encounter that presumption.

1 Rol. 132. But if the jury find the deed of *feoffment*, and that the possession hath gone along with the deed, yet the judges upon such finding, cannot adjudge it a good conveyance, for the jury are judges of the *fact*, and what is probable, and what is improbable; the court is only judge of what is *law*, and have nothing to do with any probabilities of *fact*; therefore it is the jury only, that are to make the conclusions and deductions as to the truth of the *fact*; the court cannot

make any conclusions or deductions of the truth of *facts*, if they are not drawn by necessary consequence from the words of the verdict; for, to the court, the rule is, *De non apparentibus et non existentibus eadem est ratio*, therefore they cannot conclude, that there was a lawful conveyance, unless the jury find the *livery*.

A deed of *feoffment* may be given in evidence as a release, for where the party is in possession already, the deed, only, will be a sufficient contract, to transfer a right. *Vide supra*. G. L. E. 105. Tri. per Pais, 209.

Secondly, a deed may be given in evidence, on a rule of court, without proving such deed, for if the party consent, that shall be looked upon as a good deed, and that rule is evidence of the validity of such deed, for the consent of parties concerned, must be sufficient and conclusive evidence of the truth of such fact, for the jury are only to try the truth of such facts, concerning which the parties differ. 1 Sid. 269.

(*f.*) *Of Razure, &c.*

We come now to shew in what cases *razure, interlineation, &c.* or *breaking off the seal* avoids the deed. G. L. E. 105.

As to *razure, interlineation, &c.* and *addition*.

Formerly, if there was any razure or interlineation, the judges determined upon the *profert* of the deed, and view of it, whether the deed was good or not; for the very contrivance of solemn contracts, such as deeds are, and their preference to verbal contracts, was founded on this, that the intent of the 10 Co. 92.

parties is, in the former, manifeſtly ſetled in expreſs words, and notoriouſly authenticated, and there ſuch contracts are wholly referred to the court, if the truth of the ſolemnities, *viz.* of the *ſeal* and of the *delivery* be admitted, and therefore they muſt be diſſolved by contracts of equal ſolemnity, becauſe how they are deſtroyed and avoided, muſt appear to the ſame judges that are by the law to determine of them; from hence alſo it came to paſs, that if a deed was *razed* or *interlined*, they adjudged it a void deed, becauſe it did not certainly appear to the court, that were the judges of thoſe ſolemn contracts, whether the mind of the party was contained in ſuch a mangled contract or not.

10 Co. 92. But as the manner of conveyancing ſwelled from ſhort little deeds, to large and voluminous ones, ſo much room was left for the miſpriſions of clerks, which required alteration and amendment, or, with greater labour and expence of time, to be written over again, that from thence the court thought it neceſſary not to declare the deeds *razed* or *interlined* as void, upon demurrer; but they referred to the jury upon the iſſue of *non eſt factum*, whether this deed thus *razed* and *interlined*, was the individual contract executed by the parties.

11 Co. 27. Pigot's Caſe. 2 Str. 1160. If a deed be altered by a ſtranger without the conſent of the obligee, in a point not material, this doth not avoid the deed; but otherwiſe it is, if it be altered by a ſtranger in a point material, for the witneſſes cannot prove it to be the act of the party, that ſealed and delivered it, when there is any material difference from the ſenſe of the con-

tract; but if the contract contains the ſenſe of the parties, the witneſſes may well ſwear it to be their act, for an immaterial alteration doth not change the deed, and conſequently the witneſſes may atteſt that very deed, without danger of perjury.

But if the deed be altered by the party himſelf, though in a point not material, yet it will avoid the deed; for when the party himſelf makes any alteration in his own deed, it diſcharges the contract; for the contract hath its whole form from the words of the obligor; now when the obligee undertakes to ſupply it with new words, and to alter thoſe the party hath fixed upon, this is, according to the rules of law (which take every man's own act moſt ſtrongly againſt himſelf,) a new making, and a new framing of the contract; and for a man to contract with himſelf, is utterly void and ineffectual. 11 Co. 27.

Another reaſon of this interpretation of law might be, to add a ſanction to deeds, that perſons who had them in their cuſtody, might not alter them, for fear of deſtroying their own ſecurities. G. L. E. 108.

If there be ſeveral covenants in a deed, and one of them be altered, this deſtroys the whole deed, for the deed is but a complication of all the covenants, ſo that the deed which is the whole, cannot be the ſame unleſs every covenant of which it conſiſts be the ſame alſo. 11 Co. 28. b.

All intereſts that paſs without deed, would paſs, though the deed was afterwards interlined or altered, and the intereſt once veſted, did not thereby return back again, the deed not being abſolutely neceſſary to the paſſing of the 2 Rol. Ab. 29.

 intereſt,

Unless in some particular cases. Vide 29 Car. 2. c. 3. & vide ante. interest, but only evidence that it was passed, however, by the *Stat.* it is necessary to shew a writing under the hands of the parties.

2 Rol. Ab. 29. If blanks are left in an obligation in places material, and filled up afterwards by the assent of the parties, yet the obligation is void: but if there is a blank left in an obligation, and filled up afterwards with something immaterial, this doth not avoid the contract, but where there is a material part of the contract added after the sealing and delivery, it is not the same contract that was sealed and delivered.

2 Rol. Ab. 29. In such case it should be re-executed. As if a bond be made to *C.* with a blank left for christian name and addition, which is afterwards filled up by the assent of the parties, yet this is a void bond.

1 Vent. 185. But if any immaterial part of the contract be added, after sealing and delivery, yet it is in effect the same contract, and therefore it shall not be avoided by such addition.

1 Vent. 185. 2 Lev. 35. Zouch and Clay. As if *A.* with a blank left after his name, be bound to *B.* and after *C.* is added as a joint obligor, yet this does not avoid the bond, because this does not alter the contract of *A.* for he was bound to pay the whole money without such addition.

(g.) *Of breaking off the Seal.*

Palm. 403. 1 Mod. 11. Where a thing lies in *livery*, a deed relating to it, formerly sealed, may be given in evidence, though the seal be afterwards torn off, for the interest passed by the act of *livery* which invests the party with the possession, and the possession that was once transferred by the deed, doth not return back again, though the deed be cancelled, as the deed is only an evidence of transferring possession, for by the act of *livery* the possession passes, and the

the deed without the ſeal (the *livery* being indorſed,) is an evidence of ſuch poſſeſſion; ſo if the conveyance was made by leaſe and releaſe, the uſes being once executed by the ſtatute, do not return back again by cancelling the deeds.

(*h.*) *Of Deeds cancelled, &c.*

But if a man ſhews a title to a thing lying in *agreement*, there he fails if the ſeal be torn off from his deed; for a man cannot ſhew a title to a thing lying in ſolemn agreement, but by a ſolemn agreement, and there can be no ſolemn agreement without a ſeal; ſo that poſſeſſion alone is no good title; ſince the thing itſelf doth not lye in poſſeſſion, but in agreement; therefore a man cannot claim a title to a water-courſe, but by deed under ſeal. 3 Bulſt. 79.

Where a contract creates an obligation, it cannot be pleaded, if the ſeal be taken off, for the ſeal is the eſſential part of the deed, and without a ſeal, it is no longer a deed, nor to be pleaded, nor given in evidence as a deed, unleſs in the caſe above-mentioned, where the intereſt veſts, though the deed hath no continuance; but where the deed is neceſſary to be ſhewn, in order to acquire the intereſt, there it muſt have the eſſentials of a deed, when it is ſhewn as ſuch. 2 Rol. Rep. 40. 5 Co. 23.

If an obligation be ſealed when pleaded, and after iſſue joined, the ſeal is torn off, yet the plaintiff ſhall recover his debt, becauſe the deed when proferred to the court, was in the cuſtody of the law, and therefore the law ought to defend it; beſides, the truth of the plea, which is to be proved, muſt have relation to the time when the iſſue was taken, and at the time of the iſſue, it had the eſſentials of a good Owen, 8. Cro. El. 120. 5 Co. 119. b. 1 Rol. Ab. 40. 2 Bulſt. 247. Dyer 59.

 deed,

deed, and therefore that is sufficient to maintain the issue.

2 Inst. 676. So if the seal of a deed be broken off in court, it shall there be inrolled, for the benefit of the parties, because, where any thing is impaired under the custody of the law, it shall, as far as possible, be restored by the benignity of the law.

5 Co. 23. Noy. 112. If there be a joint contract or obligation, and the seal of one of the obligors be torn off, it destroys the obligation, because they are both bound as one person, and if one be discharged, the other cannot stand bound, because they both make but one obligor.

5 Co. 23. But if two persons are bound severally, there, if the seal of one of the obligors be broken off, yet the obligation continues on the other, because there are several contractors, and several contracts, and therefore, by destroying the obligation of one of them, the obligation of the other is not taken away.

March. 125. But if two men are bound jointly and severally, and the seal of one of them is torn off, this is a discharge of the other, for the manner of the obligation is discharged, by the act of the obligee, and therefore that is (according to the rule of law which construes every man's own act, most strongly against himself,) a discharge of the obligation itself; besides, since both are jointly bound as one person, the discharging one of them is a discharge of both, and, by cancelling, a satisfaction is supposed to be given for the whole debt; and when one man is discharged, who concurs to make an obligor, and the whole debt is satisfied, no obligation can rest upon the other.

Query,

Query, If an additional reason may not be, that by tearing off the seal of one obligor, the other may not (if bound to pay the debt) be in some measure deprived of his remedy against his Co-obligor, for his proportion of the money?

(i.) *Of other Cases respecting Deeds.*

Before we close this head, we shall add a few cases, from other authors, not already cited, and some of a modern date.

A deed inrolled by consent of one party only, shall be evidence against him, and all who claim under him. 3 Lev. 388.

So a deed which begins, *This indenture*, shall be evidence, though it be not an indenture. Per Hale, at Norfolk Ass. 1668.

So a deed shall be evidence, though by accident, *&c.* the seal be broken, or torn off. [*Vide ante*, the reasoning and distinction of cases, &c.] Pal. 403. 1 Mod. 211. per B. R. 12 W. 3. inter Sir M. Dayrel & Glascock.

Though cancelled by practice. *Vide* as before. V. 1 Vent. 297.

So a counterpart, where it is proved that there was an original, and that cannot be had. *Vide infra*. V. 1 Salk. 287.

A deed is good evidence, if stamped when produced at the trial, though not stamped when executed, or when first produced. Rex v. Bp. Chester. P. 11. G. Stra. 624.

But annexing another piece of parchment stamped, will not do; the stamp must be upon the parchment itself, which contains the writing, (and to obtain this the penalty must be paid.) Rex v. Ricks. M. 13 G. Stra. 716. L. Ray. 1445.

A bond, in the condition whereof a mortgage-demise is contained, need not have two stamps. Barnes 463.

The

Mod. Ca. 225. 1 Salk. 287. The counterpart of a deed to declare the uses of a fine, is good evidence.

3 Com. Dig. 282. Proof of the execution of a deed ought to be by one of the witnesses at least.

Id. Cites per Holt. 5 An. Or, if it be proved that they are all dead, or upon strict inquiry cannot be discovered to be alive, by proof that the name of any one indorsed is the writing of the same person. *Vide ante* (*e.*) (4.)

Idem. 3 Com. Dig. 282. Or, that the name of the party, who executed it, is his proper hand-writing. Or, by

Id. any one present at the execution of the deed, though he be not indorsed as a witness.

Godfrey v. Norris, H. 3 G. Stra. 34. In debt on bond by the administrator *de bonis non* of the obligee, and who was the only surviving witness to the bond, proof of the hand-writing, and several letters from the obligor mentioning the bond, allowed good.

Lockhart v. Oxham. H. 3 G. Stra. 35. Where there were three obligors, and an action brought against one only, another of the obligors was allowed to be a witness to prove execution of the bond by the defendant.

Jones v. Mason, P. 2. G. 2. Stra. 833. If a subscribing witness is become infamous, on producing his conviction, his hand may be proved as if he was dead.

Henley v. Philips, T. 1740. 2 Atk. 48. If the attesting witness has lived abroad, strict proof of his death is necessary; if he has lived in *England*, slight proof is sufficient.

10 Co. 92. b. Generally, a copy of a deed shall not be allowed for evidence, though examined, at-

1 Mod. 94. tested, wrote by counsel as a true copy, and delivered to the party, as such.

10 Co. 92. b. Proof of the contents by witnesses shall not be allowed. *Sed vide infra.*

R. 1 Salk. 287. Nor a counterpart, without circumstances which induce credit that there was an original. *Vide supra.*

But

But a counterpart has been allowed, where the original could not be found, and there was probable proof that there was an original: as, a counterpart of a leaſe, where the leſſor himſelf acknowledged that he made a leaſe of which this was a counterpart. Per C. B. 6 An. inter A. & Whitcomb.

So, a counterpart of a leaſe, found by the heir of the leſſor among the writings of the anceſtor. 1 Lev. 25.

Though no witneſs be indorſed. Ibid.

So, if it be proved that the original was aſſigned to the defendant, or another under whom he claims. PerTracy. 6An.

Or, that the original is deſtroyed or loſt. R. Mod. Ca. 225. 10 Co. 92. b.

And in ſuch caſe proof of the contents by witneſſes may be allowed. 10 Co. 92. b.

So a copy, or proof of the contents has been allowed, when a deed was imbezilled, or detained by the other party. 1 Keb. 12. 3 Keb. 2.

Defendant in ejectment refuſing to produce the leaſe in her cuſtody, an attorney who had read it was allowed to give evidence of the contents. Young v. Holmes. M. 4. G. Str. 70.

(*k.*) *A* Recital, *when Evidence.*

The recital of one deed in another is no evidence of the deed recited, (unleſs in the caſe after mentioned,) though the deed containing the recital be well proved, becauſe there ſtill wants an atteſtation of the firſt deed; but if the perſon objecting to the evidence of the recited deed, claims under the perſon who executed the deed that recites the former deed, the reciting deed is evidence againſt him, of the reality of the recited deed, becauſe he that claims under me, ſtands in G. L. E. 99. V. 1 Salk. 286. V. infra.

my

my place, and therefore what is evidence against me, must be evidence against him.

Mich. 1718. in the Exchequer. per Gilbert, Ch. Baron. Thus in the case of *Fitz-Gerald* and *Eustace*, —*Eustace* the plaintiff claimed in equity, a debt on the defendant's estate, by virtue of a power, reserved in the grand-father's settlement on the defendant's father, to charge the estate with payment of debts, and younger childrens portions; the defendant objected that there were not proper parties, because the grand-father had made a mortgage, pursuant to that power, to one *Cox*, who was not party to the bill, and did not produce the original mortgage, but only an assignment thereof to *Wybrants*, to which the grandfather was party, yet the court allowed it to be evidence of the original mortgage, because the plaintiff claimed under the grandfather, who was party to the assignment.

Per Holt. (Vide 1 Sal. 286.) A recital may be evidence against him who *executed*, or *claims* under the party, who by such recital is *estopped*: as the date shall be evidence that it was executed the same day.

Per Tracy, 7 Ann. A recital of a jointure to *A*. that there was a jointure to her.

R. Mod. Ca. 45. So a recital of a deed is evidence of it, where the deed recited is lost.

PerGould. 12 W. 3. at Hertford, R. 2 An. 1 Sal. 286. Mod. Ca. 44. So a recital of a lease for a year in a release, shall be proof that there was such lease if possession hath been accordingly for several years. *Vide infra.*

R. Hard. 120. Semb. Vau. 74. R. 2 Lev. 108. But a recital, generally, is no proof of the deed recited: as, if a patent or lease be recited, the patent or lease ought to be proved.

2 Rol. 678. l. 40. R. 2 Vent. 171. So, if a patent be recited to be surrendered, and the patent be proved by one party as *in esse*, the other ought to prove the surrender.

Yet,

Yet, if the one relies upon the recital as proof of the patent, it ſhall be alſo proof of the ſurrender. R. 2 Vent. 171.

So a recital of a *levari*, or other record, in a record, is no proof of the *levari*, *&c. per Hale*, 23 *Car*. 2. Sir *P. Pindar*; if the record of the *levari* is not loſt. 3 Com. Dig. 283.

So a recital of a leaſe in a releaſe, is no proof againſt a ſtranger, without ſhewing that the leaſe is loſt. *Vide ſupra*. R. 1 Salk. 286.

Nor a recital of a deed for the uſes of a *fine*, without proof that there was a deed of uſes. Mod. Ca. 45.

[A.] II. (II.) OF PRIVATE WRITTEN EVIDENCE.

(II.) Of Writings without Seal.

[1.] *Wills.*
[2.] *Policies of Insurance.*
[3.] *Bills of Exchange.*
[4.] *Promissory Notes.*
[5.] *Of other Writings* without *Seal of various kinds.*

[1.] *Of Wills.*

G. L. E. 105. Cites Trin. Aff. 1701. in Kent. 2 Wms. 509. 510.
* Vide the substance of the Stat. infra.

IN proving a will according to the stat. of frauds and perjuries*, if one witness prove that the other two were present, this is sufficient proof, without having all the witnesses to prove it; for it is proved by one witness, that the will was executed according to the method required by the statute, unless on the other side such characters of fraud be shewn, as render it necessary to produce the rest.

G. L. E. 72. 1 Rol. Ab. 678.

If a man devise *lands* by force of the stat. of wills, or by custom, the probate of the will in the *Spiritual* Court cannot be given in evidence, for all their proceedings, so far as they relate to *lands*, are plainly *coram non judice*, as they have no power to authenticate any such devise, and therefore a copy produced under their seal, is not evidence.

1 Rol. Ab. 678.

But the probate of the will is good evidence as to the *personal* estate, for such probates are the records of that court, and therefore a copy of them, under the seal of that court, must be good

good evidence; and this is reasonable, because it is the usage of the court to preserve the original will, and only to give to the party a copy under the seal of the court.

Where a person in ejectment would prove the relation of father and son by his father's will, he must have the original will, and not the probate only, for where the original is in being, the copy is not evidence, in such case; the probate being no more than a true copy under the seal of the court of a private instrument; and the law, which requires the best evidence, will not allow of a copy; besides, in such case, the law doth not consider this as proof of a true copy, for the seal doth not prove the truth of the copy, unless the suit relates to the *personal* estate only. G. L. E. 73. Cites Polhill and Polhill. Hil. 1701.

But the ledger books are evidence in such a case, because these are not considered merely as copies, but they are the rolls of the court itself; and though the law doth not allow these rolls to prove a devise of *lands*, where the claim is by the words of the devise, for the reasons already given; yet when the will is only to prove a relation, the rolls of the Spiritual Court, that have authority to inroll all wills, are sufficient proof of such testaments; for if there be such a testament as appears by the rolls of that court, the relation is proved; but that there is such a will doth not appear by the copy of the will, in as much as the copy is not good evidence of an original, because the law (except in the cases before mentioned) admits nothing to be read that implies better evidence. Id.

But the copy of the Ledger book was not allowed to be read in this case, because common practice had prevailed that it should not; though G. L. E. 74.

though my *Lord Holt* ſaid, that ſince the original would have been read as a roll of the court, without further atteſtation, it was fit the copy ſhould be read, and that the practice ſhould be altered; the practice ſeems to be founded on a miſtake, that the Ledger book is read as a copy, and ſo the copy of that is but the copy of a copy, whereas the Ledger book is read as a roll of the prerogative court.

Raym. 405, 6. 1 Sid. 359. 1 Strange, 481. 1 Williams, 388.

In a ſuit relating to a *perſonal* eſtate, the probate of the will under the ſeal of the court is ſufficient evidence, and no evidence contrary to it can be given, as that ſuch will was not the laſt will and teſtament of the party deceaſed, for the ſpiritual courts are the proper judges of what is, and what is not the will of the teſtator; and ſince the authority of judging is committed to them, the temporal courts are bound by their judgments.

Raym. 405, 6. 1 Sid. 359.

But the adverſe party may give in evidence, that the probate is forged, becauſe ſuch evidence ſuppoſeth that the ſpiritual court hath not given any judgment, and ſo there is no reaſon for the temporal court to be concluded, ſince the ſpiritual court hath made no judgment in the matter, for a forged probate is none at all.

Raym. 405, 6. 1 Sid. 359.

So alſo, it may be given in evidence, that ſuch probate was obtained by ſurpriſe, for that is as much as to ſay, that the ſpiritual court hath not made any legal deciſion in the matter, and therefore, that the temporal court ought not to be concluded by its authority.

Ibid. & B. N. P. 247.

So the adverſe party may prove that the teſtator left *bona notabilia* againſt the probate by an inferior court, for then ſuch court had no juriſdiction.

If

If letters of adminiſtration be ſhewn under ſeal, you may give in evidence that they were revoked, for this is in affirmance of the proceedings in the ſpiritual court, and doth not controvert the rectitude of its deciſions. 1 Sid. 359.

A will that hath partly the form of a will, and partly the form of a deed, may be given in evidence as a will, for if the intent of the party ſhall ſufficiently appear to make a diſpoſition after his deceaſe, the informality of the words ſhall not vitiate the inſtrument. 1 Mod. 117.

Where a will remains in *Chancery*, by order of that court, a copy may be given in evidence, for then it becomes a roll of that court, and conſequently a copy of it is ſufficient evidence. 1 Keb. 117.

By the ſtatute of frauds all deviſes of lands muſt be in writing, and ſigned by the party deviſing the ſame, or by ſome other perſon in his preſence, or by his expreſs directions, and atteſted and ſubſcribed in the preſence of the deviſor by three or more credible witneſſes. 29 Car. 2. c. 3. ſect. 5.

If a will be atteſted by two witneſſes, and afterwards the teſtator make a codicil, which he declares to be part of his will, and that is likewiſe atteſted by two witneſſes, yet it will not be a good will within the ſtatute. But if a man publiſh his will in the preſence of two witneſſes, who ſign it in his preſence, and a month after he ſend for a third witneſs, and publiſh it in his preſence, this will be good. *Vide infra. And qu. if this is law?* B. N. P. 263. Carth. 35. Jones v. Lake, H. 16. G. 2. 2 Ch. Ca. 109. S. P.

Lord Chief Juſtice *Holt* appears to have been once of opinion, that it was neceſſary that the teſtator ſhould ſign the will in the preſence of the witneſſes; but it ſeems to have been ſince ſettled to be ſufficient for him to own it before them to be his hand. Show. 69. 2 Wms. 509. 3 Wms. 254. B. N. P. 263.

Ellis v. Smith, in Canc. 15 May, 27 G. 2. Cor. Ld. Chancellor, Master of the Rolls, and 2 Chief Justices.

The statute requires three witnesses to one single act of execution, and not three several executions before a single witness to each only; therefore, if a man acknowledge his seal and hand writing before three several witnesses, this will be a good execution within the statute, because the acknowledgment to all amounts to but one execution: but if he actually sign and seal the will every time before each witness separately, so as to make each a district execution, that will not be good. *Vide ante.*

B. N. P. 263.

The statute requires attesting in the testator's presence, to prevent obtruding another will in the place of the true one; but it is enough if the testator *might* see, it is not necessary he should *actually* see them sign: therefore, where the testator had desired the witnesses to go into another room seven yards distance to attest it, in which there was a window broken, through which the testator might see them, it was holden good.—So if the testator being sick should be in bed, and the curtains drawn.

Salk. 688.

Lemayn and Stanley. 3 Lev. 1. Webb and Grenville. H. 12 G. 2. Stra. 764.

Note; signing need not be by setting the name to the bottom, it is enough if the will be of the testator's hand-writing, and begin with I. *J. S. &c.* and it has been said that sealing is signing, and was so determined in the case of *Wangford* and *Wangford*, by Lord *Raymond* at *Guildhall.* But this may well be doubted, because the meaning of the statute in requiring it to be signed by the testator, was for a further security against imposition, which can be only by putting his name or mark; and of this opinion was the Court of Exchequer in a late cause, grounding themselves upon the opinion of Mr. *J. Levinz*, in

Lemain

Lemain and *Stanly*, and in the case there cited by him out of 1 R. A. 245. 25. And if a man make a will on three pieces of paper, and there be witnesses to the last paper, and none of them ever saw the first, this is not a good will. *Vide infra.* Lea and Libb.

However, where a will consisted of two sheets, and the connection went on regularly from one sheet to the other, and in the first sheet the testator gave lands to trustees after mentioned, upon trusts there specified, and in the last sheet appointed persons to be trustees; though the testator never executed the first sheet, and the witnesses never saw it, it was holden by all the judges of *England*, that if the first sheet were in the room at the time of the execution of the second, that was sufficient: for it is not necessary that the witnesses should see or know how many sheets the will consists of, or whether it is a will or not: and it is clear that a will, properly attested, may by reference bring in another instrument as part of it. Bond v. Sewell, B. R. Mic. 6 G. 3. 1 Vez. 487.

Though the statute require the attestation of the witnesses to be in the presence of the testator, yet it need not appear upon the face of the will to have been so done, but it is matter of evidence to be left to a jury. Str. 1109.

As to the *formal part* in executing of wills, the following, taken from Lord *Camden*'s argument in *Doc. Dm. Hindson & Ux. & al.* v. *Kersey*, p. 33. may be taken as a summary.

He says, "In the formal part the judges have been liberal, they have gone as far, and perhaps farther, than the words will bear, to establish the will, where the want of *formality* was only objected.

"Sealing shall be signing; 2 Stra. 764.

 "Delivery

1 Vin. abr. 125. pl. 13. "Delivery as a deed ſhall be publication of "a will;

2 Ch. Ca. 109. "The witneſſes may atteſt at different "times;

2 Salk. 688. Carth. 81. 12 Mod. 37. "The preſence of the teſtator ſhall not be "confined to the very room."

3 Salk. 395. pl. 1. Comb. 158.

"It is beyond the point of penmanſhip to "anticipate ſuch queſtions; and it muſt al"ways be remembered, that the rules of con"ſtruction were framed to ſupply the defects "of human language and capacity."

Per Lee, Ch. J. in Anſty and Dowſing. Notwithſtanding the common way is to call but one witneſs to prove the will, yet that is only where there is no objection made by the *heir*, for he is intitled to have them all examined, but then *he* muſt produce them, for the deviſee need not produce more than one, if that one prove all the requiſites; and though they ſhould all ſwear that the will was not duly executed, yet the deviſee would be permitted to go into circumſtances to prove the due execution; as was the caſe of *Auſtin* and *Willes*, cited by Lord *Hardwicke*, Chancellor, in *Blacket* and *Widdrington*, *M.* 11. *G.* 2. in which, notwithſtanding the three witneſſes all ſwore to its not being duly executed, the deviſee obtained a verdict. In *Pike* and *Bradbury*, before Lord *Raymond*, upon an iſſue of *deviſavit vel non*, the witneſſes denying their hands, the deviſee would have avoided calling them, but his lordſhip obliged him to call them, whereupon the firſt and ſecond denying their hands, it was objected he ſhould go no farther, for it was argued, that though if you call one witneſs who proves againſt you, you may call another, yet if he prove againſt you too, you can go no farther;

S. C. cited in Str. 1096.

Str. 1026.

farther; but the Chief Justice admitted him to call other witnesses to prove the will, and he obtained a verdict.

Where the attestation was only "signed, "sealed, published and declared in the pre- "sence of us," the witnesses being dead, and their hands proved, the court held it to be evidence to be left to a jury of a compliance with all circumstances. Croft v. Pawlet E. 12 G. 2.

It was laid down by *Lee*, Ch. Just. in delivering the opinion of the court of *K. B.* in the case of *Ansty* and *Dowsing*, that a devisee of any part of the estate, or a legatee where the legacy is charged upon *land*, will not be a good witness, nor would a release make him so, as that would not alter his credibility at the time of attesting. However, it has been said, that the judgment of the court was in that case founded upon the particular circumstances of the case, and not on any general doctrine, as there was not, nor could be any payment or tender made of the annuity given by the will in that case to the witness's wife; and the general doctrine laid down by Lord Chief Justice *Lee* has been since denied by the court of *K. B.* in the case mentioned in the margin. B. N. P. 265. Vide ante. Wyndham and Chetwynd, M. 31 G. 2. 1 Burr. 414.

Notwithstanding what is said in the preceding case, as to the general doctrine laid down by Lord Chief Justice *Lee*, having been since denied, we beg leave to refer the reader to the argument of Lord *Camden* in the case of *Doe. Ex. Dm. Hindson & Ux. & al.* v. *Kersey*, and let him determine for himself, whether the opinion of Lord Chief Justice *Lee* must not be completely restored in the judgment of every one who reads that argument; and whether subscribing witnesses, who

 are

are *in the least* interested at the time of the *attestation* (not included within 26 *Geo.* 2, *c.* 6.)* are *credible, i. e. competent*; or by any future act or event can be rendered so? As both cases are published together in a thin *quarto*, and may easily be had by any one, we shall not enlarge much farther upon the subject, least we should be considered as too prolix.

* Vide infra.

We shall only make one abstract from Lord *Camden*'s argument. He says, "It is "admitted that if any other description had "been added to the witnesses, that must have "belonged to them at the time; as if three "*Englishmen*, or three full aged persons had "been required, these adjuncts would have "been necessary at that time; and if so, I "see not by what rule of construction one "epithet or adjunct can be distinguished "from another." Can this argument be answered?

(*a.*) *Of the statute* 25 *Geo.* 2. *c.* 6. *respecting* witnesses *to wills.*

B. N. P. 265. To prevent, however, the inconveniences which would have arisen from the above opinion given in *Ansty* and *Dowsing*, in case it had been followed, as there are few wills in which the *witnesses* have not had legacies or debts charged upon land,

The *statute* 25 *G.* 2. *c.* 6. enacts,

1. That any beneficial devise, legacy, estate, interest, gift, or appointment, made to any person being a witness, after 24 *June*, 1752, to any will or codicil, shall be void, and such person be admitted as a witness.

2. That

2. That any creditor atteſting any will or codicil, made or to be made, by which his debt is charged upon land, ſhall be admitted as a witneſs to the execution of ſuch will, or codicil, notwithſtanding ſuch charge.

3. That any perſon who had atteſted any will, or codicil then made, to whom any legacy or bequeſt was given, having been paid or releaſed, or upon tender made having refuſed to accept ſuch legacy or bequeſt, ſhall be admitted as a witneſs to the execution of ſuch will or codicil.

4. That any legatee, having atteſted a will or codicil then made, who ſhall have died in the life time of the teſtator, or before he ſhall have received or releaſed his legacy, ſhall be deemed a legal witneſs to ſuch will or codicil.

After which there is a proviſo, that the credit of every ſuch witneſs, in any of the caſes before-mentioned, ſhall be ſubject to the conſideration of the court and jury, before whom he ſhall be examined, or of the court of equity in which his teſtimony ſhall be made uſe of, in like manner as the credit of witneſſes in all other caſes ought to be conſidered of and determined.

(b.) Continuation of proof of wills.

Though the deviſee prove the will duly executed according to the ſtatute; yet if the heir at law can prove any *fraud* in obtaining it, the jury ought to find againſt the will; for *fraud* is in this caſe examinable at law, and not in equity. Branſby and Kerridge, 28th July, 1718. in Dom. Proc.

 By

29 Car 2. c. 3. By the ſtatute of frauds, a will executed as before-mentioned, ſhall continue in force until the ſame be burnt, cancelled, torn, or obliterated by the teſtator, or in his preſence, and by his directions and conſent; or unleſs the ſame be altered by ſome other will or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or more witneſſes declaring the ſame.

Onyons and Tyrer. 1 P. W. 345. If a man deviſe his land to *A.* and then make a ſecond will, and deviſe it to *B.* and upon that cancel the firſt will, by tearing off the ſeal; if the ſecond will be not good as a will to paſs the land to *B.* (the witneſſes not having ſigned it in teſtator's preſence) it will be no revocation; neither will the tearing off the ſeal, becauſe no ſelf-ſubſiſting independant act, but done from an opinion that the ſecond revoked it.

B. N. P. 266. cites Glazier (exdem, &c.) v. Glazier, B R. Hil. 10. G. 3. *A.* deviſed to *B.* and afterwards made another will, and thereby deviſed to *C.* and expreſsly revoked all former wills. At the teſtator's death, both wills were found amongſt his papers, the firſt uncancelled, but the ſeal and name torn off from the laſt, the firſt is a good will: for one will cannot be a revocation of another 'till it becomes a perfect will, which is not 'till the teſtator's death; and at that time the laſt will did not exiſt.

B. N. P. 266. Ld Lincoln's caſe. Sh. Par. Caſes. Martin and Savage, 1740. And note; there are many other ways of revoking a will than what are mentioned in the ſtatute, as by levying a fine of the land deviſed: ſo if the deviſor marry and make a ſettlement on the iſſue, reſerving the fee in himſelf, though he afterwards die without iſſue, *&c.*

But

But where tenant in tail by bargain and ſale conveyed to *I. S.* in fee, in order to make him tenant to the *præcipe* in a common recovery, the uſe of which was declared to him in fee, and 8th *June* (*Trinity* Term beginning the 7th,) made his will, and afterwards a writ of entry was ſued out returnable in *Quind Tr.* (17th *June*) and the recovery ſuffered: it was holden that the land paſſed by the will, and the reaſon ſeems to have been, that the deed and recovery make only one conveyance, of which the deed is the moſt ſubſtantial part, and therefore every ſubſequent part muſt refer to it. But a leaſe and releaſe, and recovery ſuffered after the will is a revocation.

B. N. P. 266. Selwin and Selwin, Tr. 32 G. 2. K. B.

B. N. P. 266. Darley v. Darley, C. B. Trin. 7. Geo. 3.

[2.] Of *Policies of Insurance.*

(*a.*) *Of the Contract by Policy of Insurance, &c.*

V. St. 43 El. 12. DEFINITION. A policy of insurance is, when a merchant gives a consideration in money to others to insure his goods, ship, or other things by him adventured, upon such terms as may be agreed between the merchant and insurers.

Ma. 105. This usage was introduced by the Emperor *Claudius Cæsar*, recorded among the laws of *Oleron*, afterwards used among merchants in *England*, and since in other kingdoms.

By the *st.* 43 *El.* 12. it appears that this usage is common, when a grand adventure is made in parts remote, whereby if a ship perishes, the loss is divided among many.

R. Hard. 351. Upon this statute the King may make an office for entry of policies.

2 Sand. 200. By the instrument, or policy of insurance, in consideration of a *premium* of so much *per cent.* to be paid by the merchant, the insurers insure such a ship, her tackle, and keel, *&c.* from *London* to such a port; and if the ship, *&c.* perish, every subscriber pays the sum by him subscribed, for recompence of the loss: *Or if the insured's interest does not amount to the whole sum insured, then each pays in proportion to the sum he has insured.*

2 Sand. 200. An insurance may be made for a ship, *&c.* in her voyage to such a country, or port, and her return to *London*, *&c.* or for a voyage to

to ſuch a country, and to trade there, and return to ſuch a port.

So it may be for the goods and merchandizes laden in ſuch a ſhip; or for ſuch and ſuch goods in particular. Ma. 106.

Or for goods laden, or to be laden in any ſhip at ſuch a port, or from ſuch a country to *London*. Skin. 327.

So for money, though he has no intereſt in the ſhip or cargo, except what he lends upon *Bottomree* bond. R. 2. Ver. 717.

So an aſſurance may be made upon ſhip and goods, *loſt or not loſt*. 2 Sand. 200. V. Ma. 107.

For the goods of *A.* without account, if proved that *A.* had goods there, though the particulars are not proved. Skin. 405.

So it may be made for the life of any perſon. Ma. 107.

(*b.*) Of

(*b.*) *Of the* Conſtruction *of the Policy.*

Park 33. A Policy of inſurance being a contract of indemnity, and being only conſidered as a *parol* contract, muſt always be conſtrued as nearly as poſſible, according to the intention of the contracting parties, and not according to the ſtrict and literal meaning of the words. The mercantile law, in this reſpect, is the ſame in every part of the world; for from the ſame premiſes, the ſound concluſions of reaſon and juſtice muſt ever be the ſame. Thus, as the benefit of the inſured, and the advancement of trade, are the great objects of inſurance, policies are to be conſtrued largely, in order to attain thoſe ends; for it would be abſurd to ſuppoſe that when the *end* is inſured, the ordinary and uſual means of attaining it can poſſibly be excluded; whatever, therefore, is done by the maſter of the ſhip, in the uſual courſe, neceſſarily and *ex juſtâ causâ*, although a loſs happen thereon, the underwriter ſhall be anſwerable.

1 Burr. 347. Roccus not. 18.

1 Burr. 348.

But in the conſtruction of policies, no rule has been more frequently followed than the *uſage* of trade, with reſpect to particular voyages or riſks, to which the policy relates; and in the caſes quoted by Mr. *Park*, in his excellent Syſtem of *the Law of Marine Inſurances*, in ſupport of theſe principles it will be found, that the learned judges have always called in the uſage of trade, as the ground upon which the conſtruction turns. *Vide Park 33, & ſeq.*

It is ſaid that a policy may be explained by a *parol* agreement; as, that it ſhall not take effect 'till the ſhip arrive at ſuch a place, though the policy be from *London*. *Sed qu.? as to admitting parol evidence to contradict a written inſtrument, except as hereafter ſtated?* Salk. 444, 5. Cont. Skin. 55.

That it ſhall be for the ſhip *A.* where *B.* is commander, though the policy by miſtake was for the ſhip *B.* where *D.* was commander. Per Holt, Salk. 444.

So if the policy has a blank for the time of the inſurance, it ſhall be helped by a verdict. Semb. F.g.275.

If the ſhip or goods inſured be loſt in whole or in part, every inſurer ſhall make recompence according to his ſubſcription, or *pro ratâ* in proportion thereto. Ma. 105, 108, 118.

But a fraud in him that makes the inſurance will excuſe the inſurer; as, if the owner of a decayed ſhip after inſurance deſtroy the ſhip; or if the ſhip periſh by his default. Ma. 107.

Or the default of the pilot. *Sed qu.?* Or the ſhip be inſured as the ſhip of an ally, when it was the ſhip of an enemy. Ma. 109. Skin. 327.

So if a man knows the ſhip, &c. to be loſt before inſurance, though the inſurance was for the ſhip, *loſt or not loſt*. So if the words are general, without ſaying, *loſt or not loſt*, if the ſhip was loſt before the inſurance, though the inſured did not know it. Sho. 324.

So if the voyage be changed, or a deviation made by the default of the inſured. Sho. 324.

Or if the maſter, or the goods are transferred to another ſhip. Sho. 325.

So the inſurer ſhall not be charged for goods, &c. imbezzilled, or ſtolen by any of the Ma. 109.

the mariners, or taken feloniously out of the ship. Though the insurance be against pirates, thieves, &c. for it shall be intended of public thieves, as enemies, pirates, &c.

R. Sho. 133. So by the custom of merchants, if an insurance be upon goods in a ship to such a certain value, every insurer subscribing, after the whole value subscribed, shall return his *premium*, and shall not be charged for the goods lost, though the first subscribers prove insolvent.

R. 3. Lev. 320. 4 Mod. 60. Sho. 326. So the insurer shall not be charged if the insured does not perform the terms on his part; as, if a policy has the words, *warranted to depart with convoy*; for that imports that the insured shall take convoy for his security, and if he does not, the insurer shall not be charged.

A warranty must be literally complied with. Vide Post Essay III. De Hahn v. Hartley.

R. 3. Lev. 320. 4 Mod. 60. Salk. 443. And it is not sufficient that he took convoy for his departure, if he did not take it for the whole voyage.

4 Mod. 60. If the ship make a deviation in her voyage, or the insured act contrary to his agreement.

Sho. 324. If there are mutual covenants, and the one is the cause whereby the other cannot be performed.

R. 3. Lev. 321. 4 Mod. 60. Sho. 326. As to convoy, if it be separated by tempest, and the ship in search of the convoy be taken, it is not such a default that the insured shall lose his insurance.

Per 3 J. Holt Cont. Salk. 443. So if a convoy be taken at the usual place, *viz.* at the *Downs*, though the ship depart without it from *London*.

R. Salk. 445. So a voyage in the usual course, though it be not direct, will not be a deviation.

R. Salk. 444. So if the damage happens before any deviation, though afterwards the ship deviates, the

the insurance shall not be lost. Query, If any later determination upon this point? Vide the reasoning in *De Hahn v. Hartley. Post.* Essay III.

If the insurance be 'till the ship be discharged from the voyage, she is not discharged by arrival at the port, 'till the goods are unladen. R. Skin. 243.

(*c.*) *Of*

(c.) *Of* perils *usually insured against.*

THE usual perils expressed in policies of insurance, against which the insurer insures, are

Ma. 108.

(1.) *Perils of the Sea.*

2 Rol. 248. l. 35. D. Salk. 443. Sho. 323. And therefore, the insurer undertakes to insure against all damage by tempest, or shipwreck.

R. Skin. 3. If he insure against perils by distress of weather only, the insurer shall pay if the ship be lost in the sea, not if it be lost by capture of an enemy.

R. 2. Rol. 248. l. 40. 4 Mod. 60. Sho. 322. So against all dangers upon the sea, by pirates or men of war.

Dub. Salk. 444. So against seizure by the government,

Ma. 109. (2.) The usual hazards expressed in policies are, *men of war, enemies, pirates, rovers, thieves.*

Per Holt, Sho. 326. So against *Barratry of the master himself.*

2 Mod. Ca. 230, 231. And every fraud of the master will be barratry; as, if he run away with the ship, or imbezzil the goods. And therefore it is sufficient to assign a breach, and find by the verdict, *that by the fraud and negligence of the master, &c.* But mere negligence does not amount to barratry. Of the subject of barratry we shall hereafter treat more fully, yet as concisely as may be, referring to other authors.

(3.) *Restraint*

(3.) *Restraint of Princes, Embargo.* Ma. 110, 111.

But such a policy does not insure against restraint for non-payment of customs. Nor if the insured navigates contrary to the laws of the country. 2 Ver. 176.

(d.) *Of various Cases and Determinations.*

Boyfield v. Brown M. 10 G. 2. Stra. 1065.

AS to salvage, if it falls short of the freight, it is to be considered as a total loss.

Cary v. King. T. 9. G. 2. B. R. H. 304.

The expences of salvage may be given in evidence, though the only special damage laid is, that the goods were spoiled by the ship's sinking, for it is within the cause of action.

Seaman v. Fonnereau, H. 16. G. 2. Stra. 1183.

If a material circumstance (as that advice was come that the ship was leaky, and suddenly disappeared) is concealed from the insurer, the policy is void, though the ship is not lost, but taken by the enemy.

Green v. Brown, M. 17 G. 2. Stra. 1199.

If a ship is insured except as to captures and seizures, and four years afterwards has never been heard of, it shall be deemed sufficient evidence that she foundered, and the plaintiff shall recover against the insurers.

Sparrow v. Caruthers, T. 18 G. 2. Stra. 1236.

If goods are lost after the owner has taken them out of the ship into a lighter, and before they reach land, it is not a charge on the insurers; otherwise, if they had been sent by the ship's boat.

Waples v. Eames, M. 19 G. 2. Stra. 1243.

If a ship insured to the port of *London*, and till there moored twenty-four hours in good safety, arrives the 8th, is that day served with an order to return to perform fourteen days quarantine; the crew desert, the captain petitions to be excused, petition adjourned to the 28th, and then ordered back; she returns, performs the quarantine, applies to air the goods, and before her return

turn the ſhip is burnt, the inſurers are liable.

If a man inſures intereſt or no intereſt on any ſhip he ſhall come in from *V.* to *L.* beginning from his embarking, and the money to be paid, though his perſon eſcape, or the ſhip be retaken, and he embarks on *S.* which ſpringing leak, he goes on board *F.* he arrives in *L.* but ſhip *S.* is taken, the inſurer is liable, and if *S.* had got ſafe, and *F.* been loſt, he would not have been liable. *Vide poſt.* Dick v. Bartel, H. 19 G. 2. Stra. 1248.

If a ſhip is inſured from one port to another, but takes in goods to be delivered at a third, and is loſt before ſhe comes to the dividing point of the two voyages, the inſurer is liable, for the intention to deviate does not diſcharge him. Foſter v. Wilmer, H. 19 G. 2. Stra. 1249.

On intereſt or no intereſt inſured, a recapture, after being in an enemy's port, does not avail the inſurer. Dean v. Dicker, H. 19 G. 2. Stra. 1250. v. infra.

Coming out of harbour on a ſignal and orders from a man of war, and ſailing in the fleet for ſome time, and there taken, though unable to get ſailing orders from the man of war, is ſailing with convoy. Victorin v. Cleeve, H. 19 G. 2. Stra. 1250.

If ſhip and freight are inſured, and the ſhip is loſt whilſt careening, before the cargo is put on board, the inſurer is liable for the ſhip only, and not for the freight ſhe might have earned, if ſhe had not been loſt. Tonge v. Watts, H. 19 G. 2. Stra. 1251.

Now by ſtatute no aſſurance may be made on any ſhip or goods of the king, or his ſubjects, *intereſt or no intereſt*, or without benefit of ſalvage; but privateers, and goods from the dominions of *Spain* and *Portugal* may be ſo inſured. No re-aſſurance may be made unleſs the inſurer becomes inſolvent, or bankrupt, or dies. Money lent on *bottomree* or 19 G. 2. c.

respondentia, upon ships belonging to his Majesty's subjects, bound to or from the *East-Indies*, shall be lent only on the ship, or on the goods, and shall be so expressed in the bond; benefit of salvage to the lender, who alone may make insurance on the money lent, and no borrower shall recover more than his interest, exclusive of the money borrowed; and if his share in the ship or merchandize amounts not to the money borrowed, he shall be responsible to the lender for the difference with interest, though the ship is lost. In all actions plaintiff is, on 15 days request, to declare how much he has insured, and how much he has borrowed at *bottomree* or *respondentia*. The defendant may pay money into court.

v. Infra.

Gordon v. Morley, Campbell v. Bordieu. H. 20 G. 2. Stra. 1265.

On insurance of a ship warranted to depart with convoy, she may go to the place appointed for the general convoy for that trade (as from the *Downs* to *Spithead*) at the hazard of the insurers.

Molteux v. London Assurance Co. M. 1739. 1 Atk. 545.

If a policy of insurance differs from the *label*, *i. e.* the minute of the agreement entered in a book, and signed by the insurer and the insured, it shall be made agreeable to it.

Ibid.

If a ship at *Bengal* is insured in *London from her arrival at Fort St. George*, it means her first arrival there in her homeward bound voyage.

Ibid.

If a ship so insured, being arrived at *Fort St. George* is found leaky, and is directed by the governor to go to *Bengal* to refit, and is lost in returning from *Bengal*, it is a loss during the voyage, and, according to the adventure, intended to be insured.

If a ſhip is inſured *at* and *from* a place, whilſt ſhe is there preparing for the voyage, the inſurer is liable; but if the voyage is laid aſide, and the ſhip lies there ſeveral years, with the owner's privity, the inſurer is not liable. Chitty v. Selwin, T. 1742. 2 Atk. 359.

If a ſhip inſured is taken, retaken, and no perſon appearing to give ſecurity, condemned and ſold, the moiety paid the recaptors, and the other moiety remains with the officers of the court, and the *inſured* recovers on the policy; Chancery will not reſtrain him from proceeding for the whole, if he offers to relinquiſh the ſalvage to the *inſurer*. Pringle v. Hartley, M. 1744. 3 Atk. 195.

The inſurer, after ſatisfaction made to the aſſured, ſtands in his place as to the goods, ſalvage, and reſtitution, and is intitled to a ſhare of prizes taken by virtue of letters of repriſal. Randal v. Cockran, T. 1748. 1 Vezey, 98.

If a privateer is inſured to cruize for three months, and is taken by the enemy, retaken before ſhe is *infra præſidia hoſtis*, carried into a neutral port, and ſentenced to be reſtored to the owners on paying ſalvage, yet it is a total loſs to the inſured. Pond v. King, H. 21 G. 2. 1 Wilſ. 191.

If it is uſual, prudent, and for the benefit of all concerned, to take out the furniture, tackle, &c. of a ſhip, and put them in a warehouſe on land, at a certain place, (as on the ſand-banks in the river of *Canton*) while ſhe refits, and if they are there burnt, the inſurers are liable. Pelly v. Royal Exchange Aſſurance, P. 30 G. 2. 1 Burr. 341.

Double inſurance is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over for the ſame loſs, by reaſon of his having made two inſurances on the ſame goods or ſhip; but every caſe where there are *two* inſurances is not a *double* inſurance. *A.* at *St. Peterſburgh* is indebted Godin v. London Aſſurance Co. H. 31 G. 2. 1 Burr. 489.

debted to *B*. in *London*, who ſends a ſhip for goods, makes inſurances; *A*. ſends goods, but not bill of lading; directs inſurances to be made, which are done accordingly; *A*. indorſes the bills of lading to *C*. of *Moſcow*, who orders inſurance for the whole, which is done with *D*.; the whole is loſt; *C*. ſhall recover the whole ſum of *D*. and if *C*. is any ways intitled under the inſurances made by *A*. or *B*. *D*. ſhall ſtand in his place. This is ſtill ſtronger, if *D*. was apprized that there might be another inſurance.

Ibid.

Goſs v. Withers, M. 32. G. 2. 2 Burr. 683.

As between inſured and inſurer, a ſhip is loſt by the capture, and the inſurer muſt indemniſy the inſured as to the loſs actually ſuſtained; and he ſhall ſtand in the place of the inſured, in caſe of recapture or abandonment.

Ibid.

Generally, but not univerſally, on a capture, the inſured may demand as for a total loſs, and abandon. So, on an arreſt or embargo by a prince not an enemy. But where the capture is but a ſmall hindrance, as ſudden eſcape, or immediate ranſom, it is only an average loſs.

Ibid.

The inſured in no caſe is obliged to abandon.

Ibid.

He cannot turn what in its nature is an average loſs, into a total loſs, by abandoning.

Ibid.

A ſhip inſured is taken, the hands, except two, taken out and ſent to *France*, ſhe remains eight days in the enemy's hands, is retaken, brought to *England*; ſhe could not proceed without coming to refit, immediate notice to inſurers, with offer to abandon. This is a total loſs.

Hamilton v. Mendez, T. 1. G. 3. 2 Burr. 1198.

If a ſhip is taken, retaken, and arrived in *England* before the *inſured* offers to abandon, and

and is afterward brought to the port of delivery, and has sustained no damage from the capture, he cannot recover for a *total*, but only an *average* loss.

In an action upon the case, on a policy of insurance, though the declaration is for a total loss, and damages laid for such, and plaintiff only proves an average loss, and does not attempt to prove a total loss, yet he may recover as for a partial loss. Gardiner v. Croasdale, H. 33 G. 2. 2 Burr. 904.

The duty arises on the ship's arrival and landing her cargo, the insured has *then* a right to satisfaction, to be paid such proportion of the prime cost, or value in the policy, as corresponds with the proportion of the diminution in value occasioned by the damage; and the adjustment must be according to the value at that time, and not depend on speculations or future events. Thus *A.* insures sugars to *Hamburgh*, at 30 l. per hogshead, it is damaged, and therefore, and therefore only, must be immediately sold; the value of sugar undamaged is then 23 l. of this damaged sugar 20 l. *A.* shall pay the same proportion of 30 l. as 3 l. (the difference between 23 l. and 20 l.) is of 23 l. that is, three twenty thirds of 30 l. Lewis v. Rucker, P. 1 G. 3. 2 Burr. 1167.

In a declaration on a policy signed by an agent, plaintiff need not lay different counts, one as signed by the principal, and another as signed by the agent, duly authorized; either is sufficient. Nickleson v. Croft, T. 1 G. 3. 2 Burr. 1188.

If a ship is insured from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*, and before she arrives at *Portsmouth* the convoy is gone, (so that the insurer runs no risque for the remaining part of the voyage) he shall return part of the *premium*. Stevenson v. Snow, M. 2 G. 3. 3 Burr. 1237.

Wilson v. Duckett, M. 2 G. 3. 3 Burr. 1361.

An agreement between the insured and the first under-writer, "that he shall not be bound by his signing the policy," renders the policy fraudulent.

Ibid.

A fraudulent policy shall be delivered up, and the *premium* returned, deducting costs.

Glover v. Black, T. 3 G. 3. 3 Burr. 1394.

If a man who has lent money on *bottomree* or *respondentia*, insures on *goods*, he cannot recover; for *bottomree* or *respondentia* must be specified in the policy. *V. ante.*

Woolmer v. Muilman, T. 3 G. 3. 3 Burr. 1419.

If a ship warranted neutral property, is by stormy weather wrecked, sunk and lost; and it appears she was not neutral property when lost, the insured cannot recover.

Reed v. Cole, T. 4 G. 3. 3 Burr. 1512.

If there are articles of agreement, that when any ship wherein any member has property is lost, the rest shall contribute to such loss; and if any one would cease to be a member, he must give six months notice. *A.* has property, but parts with it before a loss, but agrees with the purchaser to pay 500 l. if loss happens, and has not given notice of ceasing to be a member, he shall recover on the articles against the other members.

Wilson v. Smith, T. 4 G. 3. 3 Burr. 1550.

Average signifies a contribution to a general loss: it also signifies a particular partial loss. If corn is insured *free from average, unless general, or the ship be stranded,* and the ship is obliged in a storm to cut away and leave her cable and anchor, and run into a port to refit, then proceeds to the port of delivery, and delivers the corn which is damaged by the storm, the insured cannot recover.

Salvadore v. Hopkins, &c. T. 5 G. 3. 3 Burr. 1707.

In insurances on *East-India* ships, it is not necessary to disclose that there has been a new agreement to detain the ship a year longer in the *Indies* than the enlarged time provided for by

by the charter-party; for this is the course of that trade, which the under-writers are presumed to know; and this detention, and its consequences, are part of the risque they insure.

If the insured conceals from the underwriter any circumstance that *increases* the risque, the policy is void. Carter v. Boehm. P. 6 G. 3. 3 Burr. 1905.

If the under-writer insures a ship as on her voyage, which he privately knows is arrived, an action lies to recover the premium from him. Ibid.

Facts only, not speculations, are to be disclosed. Ibid.

The insured need not tell the under-writer what he *actually* knows, what he *ought* to know, what he takes upon himself the knowledge of, or what he waives being informed of. Ibid.

(e.) Of

(*e*.) *Of Barratry*.

Starma v. Brown. M. 16. G.2. Stra. 1173.

TO constitute *barratry* in the master, there must be something *criminal* as well as *deviation* or *breach* of *contract*, therefore if by bill of lading he undertakes to go straight to *Marseilles*, and afterwards giving notice by advertisement, and by his owner's orders, and for their benefit, and without benefit to himself, he passes *Marseilles*, and goes to *Leghorn* first, and, in returning to *Marseilles*, is lost, it is not barratry.

Park, 34.

It is barratry in the master to smuggle on his own account.

Park, 94.

According to Mr. *Park*, any act of the master, or mariners, of a criminal nature, or which is grosly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, and without their consent or privity, is *barratry*.

Park, 94, 101.

It is not necessary, in order to make the insurers liable, that the loss should happen *in the very act of barratry*; for the moment the ship is carried from its proper track with an evil intent, *barratry* is committed.

Park, 94.

But the loss, in consequence of the act of *barratry*, must happen *during the voyage insured*, and within the time limited in the policy.

Ibid.

If the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. *Vide ante*.

Park, 94, 95, 100, 101.

If the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a *criminal* act, without his privity, though

though with the knowledge of the original owner, it is *barratry*.

The insurers, by express words, undertake generally for the *barratry* of the master and mariners. Park, 95.

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*. Ibid.

If a ship take a prize, and instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not *barratry*, because not done to defraud the owners, nor is it such a deviation as will discharge the insurers. Park, 98. Elton v. Brogden. Str. 1264.

A ship was insured from *London* to *Seville*; she was let to freight for the voyage; she sailed from *London* to the *Downs*, from whence she sailed to *Guernsey*, *which was out of the course of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ship, *but not of the freighter for that voyage*; this was held to be *barratry*. Park, 99.

A breach of an embargo is an act of *barratry* in the master. Park, 103.

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not *barratry*. Park, 103, 104.

If the master of the ship be also the owner, he cannot be guilty of *barratry*. Park, 106.

The same rule prevails if he commit an act which would be *barratry* in any other Park, 106.

master,

master, even though he has mortgaged the ship.

1 Ann. stat. 2. c. 9. 4 G. 1. c. 12. 12 G. 1. c. 29. If any captain or mariner, belonging to any ship, shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, *or of any person underwriting any policy thereon*, or to the prejudice of the owner of the ship, he shall suffer death as a felon, without benefit of clergy.

Park, 109. If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28 *Henry* 8. ch. 15.

(f.) Of

(*f.*) *Of the* Remedy *upon a Policy of Insurance.*

BY the St. 43 *Eliz.* 12. the chancellor annually, or oftener, may grant a standing commission to the judge of the admiralty, recorder of *London*, 2 doctors of the civil law, 2 common lawyers, and 8 merchants, who may examine and decree all causes concerning policies of assurance, which shall be entered within the office of assurance within the city of *London*, in a summary course, without formality of pleadings. 4 Com. Dig. 196. Vide 1 Sho. 396. New Ab. 3 v. 598. 3 Inst. 165. Str. 166.

And the commissioners shall meet weekly, and take no fee for execution of the commission.

And may summon the parties, examine witnesses on oath, and commit any who disobey their final decree.

By the St. 13 & 14 *Car.* 2. 23. the commission may authorize them, or any 3 of them, *quorum* a doctor of law, or barrister of 5 years standing to be one, to meet and make a court: and they may punish contempt of witnesses on first summons, and parties on second summons, by imprisonment and costs: and any commissioner may examine a witness going to sea, giving notice, *&c.*

And commissioners may pass a final decree and execution against body or goods, against executor or administrator, and give costs.

But by the St. 43 *El.* 12. and 13 & 14 *Car.* 2. 23. a party aggrieved, satisfying the decree, or depositing the money awarded, may in two months exhibit a bill in *Chancery* for re-

re-examination of the decree, and the Chancellor, if he affirm it, shall give double costs.

1 Ver. 223, 4. And if the commissioners decree the bill *pro confesso* upon the first summons without proof of the bill, *Chancery* upon appeal will reverse it.

A much better method of obtaining remedy is now constantly used, *viz.* that of *trial* by *jury* in an action of *assumpsit*.

(g.) *Of other Insurances, &c.*

A Warlike fort may not be insured by the governor, but a nominal fort, really a *factory*, and only defensible against black natives, may be insured by a governor who is a merchant and not a military man. Such insurance is good, though the insured does not disclose such conditions of the place as do not affect the risque insured against, nor his speculations that the enemy might make them a visit, being unable to act elsewhere, nor that the enemy designed to attack them the year before. Carter v. Boehm, P. 6. G. 3. 3 Burr. 1905.

By statute no insurance shall be made on *lives*, or other event, but by a person having interest therein, whose name must be inserted; and he can recover no more than his interest amounts to. This does not extend to *bona fide* insurances on *ships* or *goods*. 14 G. 3. c. 48.

On insurances of *houses* against fire, it is necessary the party injured should have an interest in the house at the time the policy is made out, and at the time the fire happens; therefore after the lease of an house is expired, and after the fire happens, the insured's assigning the policy does not oblige the insurers to make good the loss to the landlord, the assignee. Sadler's Co. v. Badcock, 3 Atk. 554.

Policies of insurance against fire are not assignable in their nature, nor intended to be assigned from one person to another without the consent of the office. Ibid.

(h.) Of

(*b*.) *Of Evidence.*

Park, 242. A Policy will not be ſet aſide on the ground of *fraud*, unleſs it be *fully and ſatisfactorily* proved; and the burden of proof lies upon the perſon wiſhing to take advantage of the *fraud*.

Park, 243. But poſitive and direct proof of *fraud* is not to be expected; and from the nature of the thing circumſtantial evidence is all that can be given.

Park, 243. The nature of the thing itſelf, which is generally carried on in a ſecret and clandeſtine manner, does not admit of any but circumſtancial evidence; and therefore, if no proof but that of actual fraud were allowed in ſuch caſes, much miſchief and villany would enſue, and paſs with impunity. Circumſtantial evidence is all that can be expected, and indeed all that is neceſſary to ſubſtantiate ſuch a charge. The prejudice entertained againſt receiving circumſtantial evidence is carried to a pitch wholly inexcuſable. In ſuch a caſe as this it muſt be received, becauſe the nature of the enquiry for the moſt part does not admit of any other, and conſequently it is the beſt evidence that can poſſibly be given. But taking it in a more general ſenſe, a concurrence of circumſtances (which we muſt always ſuppoſe to be properly authenticated, otherwiſe they weigh nothing) forms a ſtronger ground of belief than poſitive and direct teſtimony generally affords, eſpecially when un-

confirmed

confirmed by circumſtances. The reaſon of this is obvious; a poſitive allegation may be founded in miſtake, or, what is too common, in the perjury of the witneſs; but circumſtances cannot lie; and a long chain of well connected fabricated circumſtances, requires an ingenuity and ſkill rarely to be met with; and ſuch a conſiſtency in the perſons who come to ſupport thoſe circumſtances by their oaths, as the annals of our courts of juſtice can ſeldom produce. Beſides, circumſtantial evidence is much more eaſily diſcuſſed, and much more eaſily contradicted by teſtimony if falſe, than the poſitive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot poſſibly be the ſubject of contradiction founded merely on preſumption and probability.

The ſentence of a foreign court of admiralty is concluſive and binding upon all the world, as to every thing contained in it; and cannot be controverted collaterally in a civil ſuit. Park, 403, 407.

The firſt piece of evidence to ſupport an action on the policy is proof of the defendant's hand-writing to the policy. Park, 462.

No parol evidence of any agreement ſhall be admitted which tends to contradict the written policy. Park, 463.

The inſured muſt alſo prove his intereſt in the thing inſured, by a production of all the uſual documents, bills of ſale, bills of parcels, bills of lading, *&c.* Idem, 464.

A man having purchaſed goods abroad, in order to prove his intereſt, produced a bill of parcels, with the receipt of the ſeller to it, and proved his hand; it was held to be ſufficient evidence. Ibid.

Park, 465. The plaintiff muſt prove that a loſs has happened by the very means ſtated in the declaration.

Id. 468. Where the loſs is averred to be by perils of the ſea, it is allowable to give the expence of the ſalvage in evidence upon ſuch a declaration.

[3.] (*a.*) *Of bills of exchange and promissory notes generally.*

WE come now to other *written private* evidence *not* under seal, and this we must consider at common law, and as altered by the stat. of frauds and perjuries, *&c.* G. L. E. 112. 29 Car. 2. c. 3.

1st. At common law; and here, in the first place, the evidence of bills and notes is to be considered, and according to Gilbert's Law of Evidence, the comparison of hands is held sufficient evidence of such notes, without any other witness that saw the party write it; but with submission, we conceive this is not law, and daily practice at *nisi prius* evinces it; but one witness who has seen the party write, swearing that he *believes* it is his hand-writing, is sufficient to throw the *onus probandi* of the contrary upon the adverse party.' G. L. E. 112.

These bills or notes are either such as pass according to the custom of merchants, or which pass between party and party. Hard. 485, 486, 487.

As to merchants bills or notes, they are in the nature of letters of credit, passing between one correspondent and another in this form: *Pray pay to I. S. or order, such a sum, value received. Your's, &c. J. N. To Mr. A. B. at C.* If the correspondent accept such bill, he becomes chargeable in a special action, on the case upon the custom of merchants, but not in an action of debt, for a debt is created by receiving money from another, or by promise or solemn acknowledgment of an obligation; but there is not any promise by *A. B.* nor

Want of value received a good objection. Banbury v. Lissett & al. 2 Str. 1211. Sed q. if the payee declare for money had and received. Vide Grant v. Vaughan. 3 Burr. 1516. Vide post (f.) Vide post (e.)

nor any money received by him, but there is an acceptance of the bill, whereby money is *presumed* to be lodged in his hands, and after ſuch acceptance, it is an injury to *I. S.* to deny the payment, becauſe he relied on the credit given by the acceptance, and conſequently a damage ariſes, which is the ground of all *aſſumpſits*.

But to underſtand this matter rightly, we muſt conſider the nature of bills of exchange a little more extenſively from their original.

All exchange is made either in goods or money: if the merchant barters goods for goods, he turns them into money of his own country, and makes up the account of profit or loſs, and the balance of ſuch account is the money of his own country.

When on any occaſion he exchanges money, he compares the weight and fineneſs of the money of each country, and makes the exchange according to the proportion of the weight and fineneſs found in the money of each country, ſince an ounce of gold or ſilver, without alloy, muſt be equal to the ſame ounce in any other country; and this governs the exchange, and eſtabliſhes the rules of reduction.

Another way of exchange is by bills of exchange, or letters of credit.

Now becauſe merchants find that credit is the life of trade, therefore all methods are uſed among them that promote credit; and conſequently in the correſpondence of foreign merchants, one with another, they often give credit to each other's bills, though the one has not effects of the other in his hands to anſwer ſuch bills; and the method of exchange

is made in this manner. *A.* a merchant of *Amſterdam,* hath *B.* his correſpondent in *London;* *C.* a third perſon, is coming over from *Amſterdam* to *London,* having money in *Amſterdam,* and hath occaſion for ſuch money at *London;* *C.* therefore pays in his money to *A.* and *A.* draws a bill upon *B.* praying him to pay to *C.* the money in *London;* if *B.* ſo far credits the bill as to accept it, then is he a debtor to *C.* according to the cuſtom of merchants, and if *B.* pays the money, then is *A.* debtor to *B.* upon account for ſuch money paid; and if *C.* does not himſelf deliver the bill, but indorſes it over to a third perſon, (ſuppoſing the bill payable to order) ſuch third perſon ſtands in his place, and *C.* and *A.* are liable to him, and *B.* if he accepts the bill; if *B.* does not accept the bill, or after acceptance doth not pay it, the bill is to be proteſted before a notary, and the bill and proteſt ſent over to *Amſterdam,* and then the original drawer of the bill is liable to anſwer for the ſum expreſſed in the bill with intereſt and expences.

(b.) Of the custom of merchants, and what is to be particularly considered in the same.

IN this custom there are four things to be considered:

(1.) The *Bill.*
(2.) The *Acceptance.*
(3.) The *Protest.*
(4.) The *Indorsement.*

Molloy, 273 to 278.

FIRST, the bill; and this is in the nature of a letter desiring the correspondent, to pay so much money, either in *English* or foreign money, according to their usual value in proportion to the *English* coin, or else according to a rate agreed upon between them: the bill is either payable at sight, or, as they term it, single, double, or treble usance, which is one, two, or three months, to be computed from the date of the bill: *but as such usances vary, it is necessary in the declaration to shew what they are, or the plaintiff cannot have judgment.*

Salk. 131.

G. L. E. 116.

The bill gives the correspondent an authority to pay the money to the deliverer of the bill on his behalf, and therefore till the money be paid, it is subject to be countermanded *, though the bill was accepted, for possibly the bill was only given to the deliverer upon credit, and upon further inquiry into his circumstances, it may be necessary to countermand

* V. infra contra.

mand the payment; therefore, if the correſpondent ſhould pay the bill before the time appointed, and a countermand ſhould come, the drawer is not liable, becauſe he gave no authority to pay it before the time in the bill. *Sed q. vide infra.*

If ſeveral drawers ſubſcribe the bill, all are liable in caſe of a proteſt.

SECONDLY, the *acceptance*; and that is Moll. 273,
giving credit to the bill ſo far as to make the acceptor liable, and to truſt for a repayment to his correſpondent. If a bill be drawn upon two, it muſt have a joint acceptance, otherwiſe it may be proteſted, for the authority to pay the money is committed to them both as one perſon. *Vide infra.*

But if the bill be drawn on two or either of them, either of the perſons may accept the bill, and if one of them accepts it, it cannot be proteſted for non-acceptance, but only the party accepting, is liable to the action, becauſe he only has given credit to the bill.

But in caſe of two joint-traders, the ac- Winch, 24, 5,
ceptance of the one for himſelf and partner Style, 370. Moll. 279.
will bind the other, becauſe they trade for a Salk. 126.
common benefit, and therefore where one of 1 Ld. Raym. 175.
them gives credit it is the act of both; but if Vide 1 Salk.
a factor of the *Hamburgh* or *Turkey* company 126. cont.
draws a bill on ſuch company, and any member accept it, it ſhall not bind the company, nor any other member of it, becauſe it is only a private act of ſuch perſon, and not a corporate act of the company.

Alſo if ten ſeveral merchants, not in part- G. L. E. 117,
nerſhip, employ one factor, and he draws a bill upon them all, and one accepts it, it ſhall only bind him, and not the reſt, be-

cause they are separate in interest one from the other.

3 Bac. Ab. 610. Molloy, lib. 2. cap. 10. s. 20.

A small matter amounts to an acceptance; as if a merchant say, Leave the bill with me, and to-morrow I will accept it; this is an acceptance, for it is giving credit to the bill, and hindering the protest in the mean time.

Molloy, 279, 280. 3 Bac. Ab. 610. 1 Str. 648, 649. 2 Str. 817, 955, 1000.

But if the merchant say Leave the bill with me, and I will look over my books and accounts between the drawer and me; call to-morrow, and accordingly the bill shall be accepted; this is not a compleat acceptance, because it depends upon the balance of the account, and on the merchant's having effects in his hands to answer it; so that the merchant does not give absolute credit to the bill, the deliverer having voluntarily committed the bill to him, and delayed the protest till his answer *.

* Comb. 452.

Moor v. Whitby, T. 10. G. 3. L. R. B. N. P. 270.

A bill was drawn as follows:—" To Mr. " *R. Whitby*; Sir, please to pay Mr. *Scot*, or " order, 30 *l.* *Thomas Newton*." *Scot* indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrote thus:— " Mr. *Jackson*, please to pay this note, and " charge it to Mr. *Newton*'s account. *R.* " *Whitby*." It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor, it was only a direction to *Jackson* to pay 30*l.* out of a particular fund; and if there were no such fund, the money was not to be paid. But *per curiam* the under-writing is a direction to *Jackson* to pay the sum, and it signifies not to what account it is to be placed when paid, that is a transaction between those two only, and this is clearly a sufficient acceptance.

An acceptance may be qualified, as to pay half in money and half in bills. So to pay when goods ſent by the drawer are ſold, but he to whom the bill is due may refuſe ſuch acceptance, and proteſt the bill, ſo as to charge the drawer. The proof of the acceptance is a ſufficient acknowledgment on the part of the acceptor, who muſt be ſuppoſed to know the hand of his correſpondent, therefore in an action againſt the acceptor, the plaintiff ſhall not be put to prove the hand of the drawer; however, proof of the acceptance will not be concluſive evidence againſt the acceptor, if he can prove the contrary. B. N. P. 270. Smith & Seer, 14 G. 2. Comb. 452. Stra. 648, 1152.

The bill may be accepted in part, if the merchant has effects in his hands only to anſwer part, and be proteſted for the reſidue. Petit v. Benſon. Moll. 281. 1 Str. 214. 2 Str. 1152, 1195, 1212.

THIRDLY, the *proteſt*; and that is made before a public notary, in caſe of non-acceptance, or non-payment.

The notary is a public perſon, appointed by legal authority, to whoſe proteſt all foreign courts give credit, and the proteſt is evidence that the bill is not paid: when it is returned proteſted, the drawer is obliged to anſwer the money and damages, or give ſufficient ſecurity to anſwer the ſame within double the time that the firſt bill had to run; beyond ſea the proteſt under the notary's hand is ſufficient to ſhew the court without producing the bill itſelf, but in *England* they muſt ſhew the bill itſelf, as well as the proteſt, becauſe the whole declaration muſt be proved, which cannot be without giving the bill in evidence. Moll. 281. Skinn. 272. 2 Str. 910.

A wife or ſervant cannot accept a bill, without an authority from the huſband or maſter. Molloy, 282.

maſter. *If they uſually make ſuch acceptanses, I conceive that would be ſufficient evidence of an authority.*

B. N. P. 271. *A.* draws a bill upon *B.* and *B.* being in the country, *C.* his friend accepts it, the bill muſt not be proteſted for the non-acceptance of *B.* and then *C.*'s acceptance ſhall bind him to anſwer the money.

G. L. E. 119. So if a bill be not accepted, and a third perſon accepts the bill for the honor of the drawer, this ſhall bind him to anſwer the money, becauſe he hath given credit to the bill, and conſequently he muſt anſwer the money for which he hath given credit.

Moll. 284. 1 Mod. 27. 3 Mod. 136. 1 Vent. 45. Sho. 164. Note, that the proteſt for non-acceptance, or non-payment muſt be made and ſent over in due and convenient time, that the drawer may have remedy upon his correſpondent, if he has effects in his hands, and as to convenient time, according to the cuſtom of *London*, they allow three days of grace, for payment after the bill is become due, which ſeems to be like the *quarto die poſt*, on return of writs, and might have ſprung from thence, for the *Saxons* thought it unbecoming a freeman to be forced to do an act immediately.

1 Ld. Raym. 743. 1 Show. 164. 2 Str. 792, 829. Vide infra. When the three days of grace are out, the deliverer muſt proteſt the bill, and ſend it away by the next poſt: if the three days of grace end on a *Saturday*, he muſt proteſt it on *Monday*, and if the proteſt be not made within that time, the drawer will not be anſwerable for the money, becauſe the bill of credit was given inſtead of money, and if the payee neglects to proteſt it in due time, it is he who has given credit to the correſpondent, and therefore the drawer ought not to be anſwerable unto him.

If the laſt of the three days be a *Sunday*, or great holiday, he ought to demand the money on the ſecond day, and if not paid proteſt it on the ſame day, otherwiſe it will be at his own peril. 1 L. Ray. 743.

If the indorſee accept any part of the money from the acceptor, he cannot afterwards reſort to the drawer for the remainder, unleſs he give timely notice to the drawer that the bill is not duly paid. For where a man takes part of the money only, and does not apprize the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from an acceptor or indorſer, will not diſcharge the drawer or other indorſers: for it is for their advantage that as much ſhould be received from others as may be.. B. N. P. 271. Johnſon v. Kenyon, C. B. H. 5 G. 3.

If a bill be left with a merchant to accept, he to whom it is payable, in caſe it be loſt, is to requeſt the merchant to give him a note for the payment according to the time limited in the bill; otherwiſe there muſt be two proteſts, one for non-payment, the other for non-acceptance. B. N. P. 271.

Note alſo, that a bill once accepted cannot * be revoked, although the acceptor hath advice that the drawer is broken, becauſe by acceptance he hath given credit to the bill, and after credit given, the acceptor has made the bill his own, and by the cuſtom the payment is to be made where the credit was given. The cuſtom muſt be particularly alledged †, being the foundation of the action, or the party will be nonſuited, but he need not alledge a particular place of demand, becauſe the demand is not traverſable, beſides, that Moll. 283. Style, 370.

* This I conceive is law, notwithſtanding what is ſaid to the contrary ante.

† But not ſet forth at length.

that appears on the proteſt of the notary, therefore the demand is not part of the cuſtom on which the action is founded.

B. N. P. 271. Gooſtrey and Mead. Weſt. 1751.

A. drew a bill of exchange in the *Weſt-Indies* on *T.* in *London*, at ſixty days ſight, to *W.* or order, *W.* indorſed to *G.* who preſented the bill to *T.* who refuſing, *G.* noted it for non-acceptance, and at the end of ſixty days proteſted it for non-payment, and then wrote a letter to *A.* and alſo to his agent in the *Weſt-Indies*, acquainting them that the bill was not accepted. In an action brought by *G.* againſt *A.* on this caſe, he was nonſuited, for by not ſending the proteſt for non-acceptance, he made himſelf liable. The uſe of noting is, that it ſhould be done the very day of refuſal, and the proteſt may be drawn any day after by the notary, and be dated of the day the noting was made.

Fourthly. Of the *Indorſement*, it is uſual when bills of exchange are drawn, eſpecially if they are payable at two or three uſances, for the payee to indorſe them over to others in the courſe of trade, and the receiver of ſuch bills has not only the original credit of the drawer at ſtake, and of the acceptor, if the bill be accepted, but alſo of the indorſers of ſuch bills, becauſe the indorſers have paſt ſuch credit in their payments, inſtead of money, and the perſons receiving ſuch bills, have actions in their own names againſt either, for all their ſeveral credits are at ſtake, when they have paſſed their ſubſcriptions inſtead of money.

(*c.*) *Of*

(c.) *Of the statute Law relative to Bills of Exchange and Promissory Notes.*

THE statute 9 & 10 *W.* 3. *c.* 17. gives power of protesting any inland bill of exchange of five pounds or upwards, (in which is acknowledged and expressed the value to be received;) but this act has no effect, unless the party on whom the bill was drawn, accept it by underwriting; therefore by the 3 & 4 *An.* *c.* 9. the same power is given in case the party refuse to accept it, with proviso that no protest shall be necessary, unless the bill be drawn for twenty pounds or upward. B. N. P. 277.

By 9 & 10 *W.* 3. *c.* 17. and 3 & 4 *An.* *c.* 9. inland bills of exchange are put upon the same foot with foreign bills; and though they require the acceptance to be in writing, in order to charge the drawer with damages and costs, yet there is a proviso that it shall not extend to discharge any remedy against the acceptor, so that an action will still lie on a parol acceptance. Stra. 1000.

By the 3 & 4 *An.* *c.* 9. all notes in writing that shall be made and signed by any person, whereby such person promises to pay to another, or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to such person to whom the same is made payable; and every note made payable to any person or his order, shall be assignable or indorsable over, and the person to whom such sum of money is by

such

ſuch note made payable, may maintain an action for the ſame, either againſt the perſon who ſigned ſuch note, or againſt him who indorſed it; and in every ſuch action the plaintiff ſhall recover his damages and coſts.

B. N. P. 277. As the intent of the 3 & 4 *An.* was to put promiſſory notes upon the ſame footing with inland bills of exchange, what is herein ſaid with regard to promiſſory notes is applicable to ſuch inland bills. However, the analogy between promiſſory notes and bills of exchange ſhould be attended to, in order the better to underſtand the caſes. Whilſt the promiſſory note continues in its original ſhape, there is none; but when the note is indorſed, the reſemblance begins; for then it is an order to pay the money to the indorſee, and this is the very definition of a bill of exchange; therefore the indorſee, before he brings an action againſt the indorſer of a promiſſory note, ought to demand the money of the drawer; but it muſt be made on the drawee before an action is brought againſt the indorſer of a bill of exchange; and no inquiry need be made after the drawer.

Heylin v. Adamſon, M. 32. G. 2. K. B.

Salk. 131. It has been holden upon theſe ſtatutes, that in declaring upon an inland bill, a proteſt need not be ſet forth, as it muſt upon a foreign bill, for the ſtatute does not take away the plaintiff's action for want of a proteſt, but only deprives him of damages or intereſt.

6 Mod. 81. But if any damages accrue to the drawer for want of a proteſt, they ſhall be born by him to whom the bill is made; and if, in ſuch caſe, the damage amount to the value of the bill, there ſhall be no recovery.

By

By 9 *An. c.* 14. all notes and bills given by any perſon, where the whole, or any part of the conſideration ſhall be for money or other valuable thing won by gaming, or betting, on the hands of thoſe that game, or for money lent for the purpoſe, ſhall be utterly void.

By 12 *Ann. ſtat.* 2. *c.* 16. all uſurious contracts and aſſurances are void.

By 9 & 10 *W.* 3. *c.* 17. § 3. if any inland bill of 5 *l.* or upwards, payable at a certain number of days, weeks, or months after date ſhall be loſt within the time limited for payment, the drawer ſhall be obliged to give another bill of the ſame tenor, the party giving ſecurity to indemnify the drawer in caſe the firſt bill ſhould be found.

By 15 *G.* 3. *c.* 51. all promiſſory or other notes, bills of exchange or drafts or undertakings in writing, being negotiable, or transferrable for the payment of any ſum or ſums leſs than twenty ſhillings in the whole, are declared abſolutely void.

And by 17 *G.* 3. *c.* 30. all promiſſory notes, bills of exchange, drafts, or undertakings in writing being negotiable or transferrable, for the payment of twenty ſhillings, or any ſum of money above that ſum, and leſs than five pounds, if iſſued in *England*, ſhall ſpecify the names and places of abode of the perſons reſpectively to whom or to whoſe order the ſame ſhall be made payable, and ſhall bear date before or at the time of drawing or iſſuing thereof, and not on any ſubſequent day, and ſhall be made payable within twenty-one days after date, and ſhall not be negotiable after the time limited for payment; and every indorſement ſhall be

made before the expiration of that time, and bear date at or before the time of making thereof, and shall specify the name and place of abode of the person to whom, or to whose order, the money is to be paid. The signing of the note and indorsement to be attested by one subscribing witness at least; the forms are specified in the act. Notes and bills, &c. negotiable, of such value, made or indorsed contrary to the direction of the act, are declared absolutely void.

By 23 G. 3. c. 49. s. 2, 6. a stamp duty is imposed upon every foreign or inland bill, promissory note, or other note, draft, or order under 50 *l.* of 6 *d.* If for 50 *l.* or upwards, 1 *s.* If under 10 *l.* and payable upon demand, 3 *d.* By 24 G. 3. sess. 1. c. 7. s. 3. all drafts upon bankers, except payable to bearer, are liable.

Though 23 G. 3. c. 49. s. 2. imposes 1 *s.* upon foreign bills, *&c.* if for 50 *l.* or upwards, yet by s. 8. it is provided that no foreign bill, *&c.* shall be charged with more than 6 *d.* and every duplicate and triplicate 6 *d.*

(*d.*) Remedy

(*d.*) Remedy *upon a Bill of Exchange, against the Drawer.*

IF *A.* draws a bill of exchange upon *B.* payable to *C.* and it be protested for non-acceptance, not finding other security, or for non-payment by *B.* an action upon the case in *assumpsit* lies against *A.* by the custom of merchants, for the money, and the damages consequent upon non-payment. 4 Com. Dig. 202.

So a general *indebitatus assumpsit* lies against the drawer, for money received to the plaintiff's use. 1 Salk. 125.

So debt lies against *A.* who was indebted by receipt of the money. 1 Salk. 23. R. Cont. in T. 11 G. in B. R. Welsh and Craig, 1 Stra. 680.

And *A.* shall be charged, though he be not a merchant; for when he makes a bill of exchange, he shall be liable according to the usage among merchants. R. 2 Vent. 295, 310. R. 1 Salk. 125. Sho. 125. Carth. 82.

So *A.* shall be charged upon an inland, as well as upon a foreign bill of exchange. 1 Salk. 125. Clift 927.

So he shall be charged by *C.* though he has indorsed it to *D.* for his account, and as servant to him. R. Sho. 164.

So if a bill be payable to *C. or order, or to C. and his assigns*, and by indorsement *C.* assigns to *D.* and he to others, and *B.* does not accept, &c. an *assumpsit* lies against *A.* by any indorsee, or assignee. R. 2 Vent. 308.

So if *B.* accepts, and afterwards fails in payment. 4 Com. Dig. 202.

So if an indorser pays to any indorsee, *A.* is afterwards liable to him. R. Lut. 888. Carth. 130.

R. Carth. 5. So *A.* will be liable, though the indorſer was a truſtee for *C.* againſt whom an extent was ſued.

Marſ. 35. But if the drawer upon proteſt repay the money to the deliverer, he ſhall not be afterwards liable to *C.* or any indorſee.

Per Treby. 1 Salk. 127. So the drawer ſhall not be charged, if the bill be not, after the time of payment, proteſted in a convenient time.

Per Holt. 1 Salk. 133. If a bill be *not* payable to another *or order*, though it be indorſed, the indorſee ſhall not charge the drawer.

Gee v. Brown, M. 1. G. 2. Stra. 792. If the indorſee gives the acceptor time for payment ſeveral times, 'till the acceptor fails, he cannot recover againſt the drawer.

Coleman v. Sayer. H. 2. G. 2. Stra. 829. If a bill of exchange accepted, and payable on *Saturday*, is not tendered till *Tueſday*, when the acceptor ſtops payment, the drawer is diſcharged.

Johnſon v. Kennion, P. 5 G. 3. 2 Wilſ. 262. The indorſee may recover the whole ſum againſt the drawer, though the indorſer has paid him part of it.

B. N. P. 277. Chamberlayne v. Delaryſe, C. B. T. 7 G. 3. A bill was drawn by the defendant upon *H.* for work done by the plaintiff on the defendant's farm, in the poſſeſſion of *H.* The plaintiff did not give notice to the defendant that the bill was not paid 'till three months after it was drawn, and after a verdict for the plaintiff, the court granted a new trial, holding this to be ſuch laches as diſcharged the defendant.

B. N. P. 269. A foreign bill of exchange was drawn payable at 120 days after ſight, but when the bill was preſented for acceptance, that was refuſed; upon which an action was immediately brought againſt the drawer, without waiting

Bright v. Purrier. Sittings after Tr. 1765. 3 Burr. 1687.

waiting 'till the expiration of the 120 days. On the trial the defendant objected that he was not liable 'till the expiration of the 120 days, and offered to call evidence to prove that the custom of merchants was such. But Lord *Mansfield* said the law was clearly otherwise, and refused to hear the evidence. So the plaintiff recovered.

(*e.*) Remedy *againſt the* Acceptor *and* Indorſer.

R. 1 Rol. 6. l. 45. 2 Cro. 306. IF *A.* draws a bill of exchange upon *B.* payable to *C.* or order, and *B.* accepts it, an *aſſumpſit* lies by the *cuſtom* of *merchants* by *C.* againſt *B.* for by his acceptance he undertakes to pay.

4 Com. Dig. 203. So if *C.* by indorſement aſſigns to *D.* and he to others, *B.* will be liable to an *aſſumpſit* by any aſſignee.

R. Skin. 343, 410. So every indorſer ſhall be liable to any ſubſequent indorſee.

R. 1 Sal. 125, 133. Skin. 410. Though the bill was payable to *B. or bearer*, for the indorſement makes a new bill. *Vide poſt.* (*f.*)

Per Holt, 1 Sal. 127. Though the bill was forged, *&c.* for the indorſement charges the indorſer, and therefore the hand of the drawer to the bill need not be proved.

Dub. T. 12 W. 3. inter Milner and Harriſon. 4 Com. Dig. 203. If *A.* draws two or three bills for the ſame ſum, according to the cuſtom of merchants, the one payable if the other be not paid, and *B.* accepts the ſecond and not the firſt, an *aſſumpſit* lies againſt him upon the firſt, with an averment that he has not paid the one or the other.

1 Sal. 126. If *B.* accepts a bill for himſelf, and *C.* who are joint-traders, in reſpect of their trade, both are bound.

R. Carth. 459. If the acceptance be a year after the bill was payable.

R. Sho. 4. So if *A.* draws a bill payable to *C.* for the uſe of *D.* and *C.* indorſes it, an *aſſumpſit* lies

lies by the indorſee, though C. had paid it upon an extent at the ſuit of the King againſt D. for C. was the viſible owner.

Though C. ſold to the indorſee upon a diſcount, where the bill is payable to C. *or order*, and not *bearer*. Per Holt, 1 Sal. 128.

But *debt* does not lie againſt the acceptor; for his engagement is collateral. *Vide ante.* (*a.*) R. Hard. 487. Acc. 1 Sal. 23.

So if the drawer upon a proteſt repay the money mentioned in the bill to the deliverer, the acceptor cannot be afterwards ſued by him to whom the bill was payable, if he was only aſſignee to the deliverer. Marſ. 35.

If the indorſer hath paid part of the money, that will diſpenſe with the neceſſity of proving a demand on the drawer. Stra. 1246.

If an indorſer be not charged in a convenient time after the bill due, an action does not lie againſt him. *Vide poſt.* Eſſay II. V. *Tyndall* and others *v. Brown.* Per Holt, 1 Sal. 128, 132.

Or, if there be not a demand, or a prior endeavour to obtain payment from him who drew the note, or to whom the bill was directed. As to the caſes in *Salkeld*, *Vide* 2 *Burr.* 677, 8. 1 *L. Ray.* 443. 12 *Mod.* 244. I have not exactly followed *Salkeld*. *Vide poſt.* (*f.*) 1 Sal. 126, 127, 132.

If there be not a demand on the indorſer after the indorſement made. Per Holt, 1 Sal. 128.

So if a bill payable to *B. or bearer*, be indorſed to another, the indorſee cannot maintain an action upon it. *Vide infra.* (*f.*) R. 1 Sal. 125. Skin. 332.

A caſh note on a banker, payable to *the ſhip Fortune or bearer*, is a good and negotiable bill of exchange, and the bearer may B. N. P. 273. Grant v. Vaughan, B. R. T. 4 G. 3. 3 Burr. 1516.

 maintain

maintain an action on it in his own name; or he may recover on it in an action for money had and received to his use. But in either case he must prove that he got the bill fairly and *bonâ fide*.

Wilkinson v. Lutwidge, M. 11 G. Str. 648. In case against the acceptor, the drawer's hand, need not be proved, but the defendant may disprove it.

Burrows v. Jemino in Canc. M. 13 G. Str. 733. The acceptor cannot be sued here, after he has been discharged by the laws of the country where the acceptance was made.

Thomas v. Bishop, M. 7 G. 2. Stra. 955. B. R. H. 1. Action lies for the indorsee (*query*, as to the drawee?) of a bill of exchange against a servant on whom it is drawn and accepted generally, though the order is to place it to the account of his masters, and the letter of advice sent to his masters.

N. B. The bill was not drawn on him, or accepted by him, as the servant of the company to whom he belonged, and on which company the intent was to draw.

Powel v. Monnier, P. 1737. 1 Atkyns 611. If *A.* draws on *B.* for 50*l.* in favour of *C.* who indorses and negotiates the bill, which is sent to *B.* who keeps it ten days 'till payable, and then returns it unaccepted, but having put a private mark on it, the indorsee demands and receives the money from *C.* in the mean time *A.* is bankrupt, *C.* brings bill against *B.* who answers, and dies, and the cause is revived against his executrix; equity will retain the bill, though for a legal demand, (otherwise, if *B.* had been alive) and determine on the facts relating to the legal demand; and will decree *B.*'s executor to pay *C.* the 50*l.* and interest, from filing the original

nal bill, and costs from filing the bill of revivor.

Action lies for the drawer, against the drawee, after acceptance. *Simmonds v. Parminter. H.* 21. *G.* 2. Affirmed by the House of Lords. 1 Wilf. 185. 6 Com. Dig. 431.

(f.) How *the* Remedy *is to be pursued.*

Per 2 J. 1 Vent. 153. Semb. Lut. 1585, 1594. Carth. 83. Skin. 332. R. 2 Mod. Ca. 373.

IN an *assumpsit* upon a bill of exchange, the plaintiff must declare upon the *custom* of *merchants*; for an *indebitatus assumpsit* does not lie without a consideration proved. *Vide infra.*

1 Vent. 153. R. 1 Sal. 24, 129. 1 Lev. 298.

And if the declaration be upon the custom, and also an *indebitatus assumpsit*, and intire damages, there shall be no judgment. *Sed qu.? surely this must mean where the custom is set forth specially, which is unnecessary. Vide infra.*

R. Lut. 892. b.

So it must alledge the custom *amongst merchants, &c.* for if it be alledged amongst all persons, it will be bad.

R. Hard. 486. R. 5 Mod. 367.

Or that *by the custom of England*, though the words *of England* shall be rejected as surplusage.

R. Lut. 233.

So the declaration must shew the custom pursued; and therefore it ought to shew the time and manner of acceptance, *i. e. where the custom is specially stated, which is not necessary. Vide infra.*

1 Sal. 131.

It ought to shew what the time shall be by the usage, if the bill be payable at *usance, &c.*

R. Lut. 233, 1585.

But if the custom be alledged at *London, that any merchant, &c.* it is well.

R. Sho. 129, 317. B. N. P. 278.

And if it be GENERAL, *that by the custom of merchants, &c.* it is sufficient, without shewing the custom specially; for the court will take notice of it.

R. 1 Sal. 128.

If the declaration be *upon the custom,* and that *he to whom directed refused payment,* per quod

quod *the drawer onerabilis devenit*, it is sufficient, without an express promise alledged.

So it is sufficient to say *quod fecit billam manu suâ subscript'* though it does not say, *secundum usum mercatorum*, R. Lut. 279.

Or, that value was received. Vide ante. (*a.*) Lut. 889. a.

That it was accepted and paid for the honor of the drawer, without saying to whom, *R. after verdict.* R. Lut. 899. b.

That the defendant was an indorser, without an averment, that the plaintiff demanded it of the drawer, or former indorser. Cont. per Holt, 1 Sal. 126. R. Acc. 1 Sal. 133. Vide ante.

That the defendant undertook to pay secundum tenorem billæ, though the acceptance was after the bill due; for, *secundum tenorem*, shall be rejected as surplusage. Per Holt, 1 Sal. 127, 129.

The acceptance may be stated under a scilicet, any day, before due.

It is not necessary to make mention of the protest in a declaration upon an inland bill upon the *St.* 9 & 10 *W.* 3. 17. R. 1 Sal. 131.

Or, that he inquired for him, to whom the bill was directed, before protest; for, *quod non fuit inventus*, is sufficient. R. Carth. 510.

Nor is it necessary to alledge a promise after protest. R. Carth. 510.

So, if the custom be alledged, that the bearer shall maintain an action upon a bill payable to *B. or Bearer*, and the defendant demurs, judgment shall be for the plaintiff; for by the demurrer the custom is confessed, though there is none such. *Vide ante* (*e*). R. 1 Sal. 125. Skin. 346.

So, if the declaration alledges, *quod indorsavit*, without saying, that he subscribed it, it is sufficient after verdict for the plaintiff; for a good indorsement must be proved. R. 1 Sal. 130.

So, if the action is upon the first bill, and it is not alledged, that the 2d. or 3d. was R. 1 Sal. 130. Carth. 510.

not paid; for it ſhall be intended after verdict.

R. Sho. 318. So, if the declaration alledges the cuſtom to be, that if a bill be duly accepted and afterwards refuſed, the drawer ſhall be liable, and ſhews that the bill was after the time it became due preſented and refuſed, it will be well; for the drawer is liable at any time; and the alledging the cuſtom more ſtrict than was neceſſary was ſurpluſage.

It is not neceſſary or prudent, to ſet forth the cuſtom ſpecially.

R. Carth. 83. In a plea of a bill of exchange, the cuſtom need not be alledged.

Wegerſloffe v. Keene, M. 6. G. Str. 214. When a bill is drawn, *pay my firſt, my ſecond not paid,* in an action on the firſt, it is not neceſſary to aver that the ſecond was not paid; the averment on one goes to the other alſo.

Ibid. It is not neceſſary to lay an expreſs *aſſumpſit*; nor to alledge a requeſt before action brought.

Sed qu. if there was a ſpecial demurrer and thoſe omiſſions aſſigned for cauſes?

Bromley v. Fraзier, T. 7. G. Str. 441. *Per curiam* on conſideration, a demand on the drawer of a foreign bill of exchange is not neceſſary to make a charge on the indorſer, but the indorſee has liberty to reſort to either for the money.

Lawrence v. Jacob, P. 8. G. Str. 515. The *ſecond indorſer*, in an action againſt the *firſt*, need not ſhew a demand on the *drawer*, but he ſhould ſay he has not paid it. *Vide infra.*

Acheſon v. Fountain, T. 9. G. Str. 557. If a bill be drawn payable to *A.* or order, who indorſes it to *B.* without the words "or order," and *B.* declares as on an indorſement *to him or order*, it is good, and *B.* might have indorſed it. *Vide infra.*

The words "or order" are not neceſſary to be inſerted in the *indorſement*, the bill is negotiable without them. Edie v. E. I. Co. T. 1 G. 3. 2 Burr. 1216. V. poſt.

A demand need not be made on the *drawer* of a bill of exchange, to intitle an *indorſee* to an action; for every indorſer is a new drawer. *Vide ſupra.* Per Hardwicke, C. Lake v. Hayes, H. 1736. 1 Atkyns, 281.

In actions on *inland bills*, by *indorſee* againſt *indorſer*, plaintiff muſt prove demand, or due diligence to get the money from *drawee* or *acceptor*, but need not prove demand on *drawer*, but on *promiſſory notes*, *indorſee* plaintiff muſt prove demand or diligence on *maker* of the note. *Vide poſt*. [4]. (*a*.) Heylyn v. Adamſon, M. 32. G. 2. 2 Burr. 669.

The *indorſee* of an *adminiſtrator* may declare, without a *profert* of letters of adminiſtration. Barnes, 164.

"Pay the contents," may be wrote in court over the indorſer's name. Barnes, 453.

[4.] (a.) *Of promissory Note.*

BY the St. 3 & 4 *Ann.* 9. all notes made by any person (or by the servant or agent of any trader, usually intrusted to sign notes for his master,) shall be payable, indorsible, or assignable.

And action may be maintained against him who signed, or whose servant or agent signed it, or against any of the indorsers.

And notes payable to any, or bearer, shall be construed due to the person to whom made payable. *Vide ante.*

R. Cont. in C. B. T. 9 W. 3. rot. 500. Cromwell. Dub. B. R. T. 12 W. 3. inter Swift & Butcher. R. acc. B. R. Clerk & 4 Com. Dig. 205. R. 3. Lev. 299. Acc. inter Butcher & Swift, R. 1 Sal. 24. 129.

Before that statute, a note payable to *A. or order*, if it was assigned or indorsed to *B.* could not have been sued by *B.* except in the name of *A.* for it was not in the nature of a bill of exchange.

Martin, 1 Sal. 129. R. inter Buller & Crips, 2 Ann. Mod. Ca. 29.

So, upon a note *to A. or bearer*, the law does not presume an *assumpsit* to the bearer. T. 12. W. 3.

And the plaintiff could not declare upon a promissory note, as upon a bill of exchange.

2 Mod. Ca. 374.

If a note be payable *to A. or order*, an *assumpsit* lies by *A.* or by any to whom it shall be indorsed; for by the St. 3 & 4 *Ann.* 9. the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages.

R. 2 Mod. Ca. 373.

Yet *debt* does not lie upon a promissory note, by any, against the *indorser*, or *drawer*; for it is made by the St. 3 & 4 *Ann.* 9. of the nature of a *bill of exchange* which is only *evidence* of a debt. *Qu.?* However, as to the *drawer*.

A pro-

A promissory note to pay within two months after a ship is paid off, is assignable, and assignee may maintain action on it. H. 23 G. 2. Andrews v. Franklin, H. 3 G. Str. 24. Evans v. Underwood. 1 Wilf. 262.

But a bill to pay out of drawer's growing subsistence is not negotiable. H. 11 Ann. Jocelyn v. Laserre. ibid.

A promissory note from *A.* to pay so much to *B.* for the debt of *C.* to *B.* is within Stat. 3 & 4 *Ann.* and negotiable. Popplewell v. Wilson, H. 6 G. in Error, Str. 264.

If a promissory note is wrote in the defendant's own hand, and his name is in any part of it, there needs no subscription, nor need it be laid in the declaration that he signed it. Taylor v. Dobbins, M. 7 G. Str. 399. Elliott v. Cooper, M. 7 G. 2. Ld. Raym. 1376. Str. 609.

If one action is brought against the drawer, and another against the indorser of a promissory note, execution shall be only on one. In fact, the principal in one action, and costs in both being tendered, the court would not permit any execution to issue. Windham v. Wither, P. 8 G. Str. 515.

A promissory note to be accountable to order for 100 l. value received, is negotiable, and within the statute. Morris v. Lee, T. 11 G. Str. 629. 2 Ld. Raym. 1396.

" *I do acknowledge that A. delivered me such bonds and notes, and B.'s receipt and bill on me for* 10 *l. which* 10 *l. and* 15 *l.* 5 *s. balance due to A. I am still indebted, and promise to pay,*" is a note within the statute. Chadwick v. Allen, T. 12 G. Str. 706.

If the indorsee receives part of the drawer, the indorser is absolutely discharged. *Vide infra. & qu.?* If no laches. Kellock v. Robinson, H. 13 G. Str. 745.

It is the same thing, whether the drawer, or one for him, pays the money; and so if the drawer is sued by the indorsee, who obtains interlocutory judgment, and the bail pay the note, and take assignment of note and judgment, they cannot recover against the indorser. Hall v. Pitfield, H. 17 G. 2. Wils. 46.

" I pro-

Burchel v. Slocock, M. 2 G. 2. Ld. Raym. 1545. "I promiſe to pay to *A.* &c. three months after date, value received of the premiſſes in *Roſemary-lane*," is a good promiſſory note within the ſtatute.

Syderbottom v. Smith, M. 12 G. Stra. 649. *Eyre, C. J.* in *C. B.* directed the jury to find for the defendant, *indorſer* of a promiſſory note, becauſe the plaintiff did not prove demand on the *drawer*.

Collins v. Butler, H. 11 G. 2. Str. 1087. per Hardwicke, C. J. ſed vide infra, Cooper v. Le-Blanc. There muſt be (according to the caſe in the margin) a demand on the *drawer* of a *note* before the *indorſer* can be charged; if he is run away, it is not enough to ſhew that, but plaintiff muſt prove he attempted to find him. *Vide ſupra, & infra.*

Cooper v. Le-Blanc, T. 9 G. 2. B. R. H. 295. *Hardwicke, C. J.* ſaid, *Holt, C. J.* and *Eyre, C. J.* were of opinion that the *indorſer* of a promiſſory *note* ſhould not be charged, unleſs a demand had been made on the *drawer*; but that *Pratt, C. J. King, J. C. Raymond, C. J.* and himſelf, were of opinion he might, and determined accordingly in this caſe. *Vide ſupra, & infra.*

Hamilton v. Mackrell, M. 10 G. 2. B. R. H. 322. Whether demand on *drawer* is neceſſary to charge *indorſer*, is a point in much doubt, but the objection muſt be made at the trial, for on the face of the declaration it is well.

Theed v. Lovell, M. 12 G. 2. Stra. 1103. If plaintiff has indorſed a note in blank, his name may be ſtruck out after the note is delivered in at *niſi prius*.

Vaughan v. Fuller, H. 19 G. 2. Str. 1246. If indorſer pays part of a note, it is not neceſſary to prove demand on the drawer.

Beardſley v. Baldwin, P. 14 G. 2. Str. 1151. A promiſſory note, to pay ſo many days after the grantor ſhould marry, is not negotiable within the ſtatute.

Cooke v. Colehan, M. 18 G. 2. Str. 1217. To pay ſix weeks after the death of his father is negotiable; for this is not ſuch a contingency, whereby it may *never* become payable.

A note

A note to deliver up horſes and a wharf, and to pay money at a certain day, is not within the ſtatute. Martin v. Chauntry, T. 21 G. 2. Str. 1271.

If a huſband indorſes a note given to him by his wife, it is good as between him and the indorſee. Haly v. Lane, P. 1741. 2 Atkyns, 181.

So if the note be given by an infant. Ibid.

So though ſome of the indorſees did not pay a valuable conſideration, yet if the laſt did, it is good as to him, unleſs fraud or equity appears. Ibid.

A note given to an infant, payable when he ſhall come of age, *viz, ſuch a day*, is within the ſtatute. Goſs v. Nelſon, H. 30 G. 2. 1 Burr. 226.

A note payable eventually, upon an uncertain contingency, can never be a negotiable note; as to pay on the death of *A.* if he leaves drawer ſufficient to pay it, or he is otherwiſe able. Roberts v. Peake, P. 30 G. 2. 1 Burr. 323.

Proof of the *acknowledgment* of indorſer of his name, is not evidence againſt the drawer in an action by indorſee; the indorſer's hand muſt be proved. Barnes, 436.

(*b.*) *What Words make a promiſſory Note aſſignable.*

R. 11 Geo. 2 Mod. Ca. 363. A Promiſſory note does not require any expreſs form of words: and therefore, a note whereby *A. promiſes to account with B. or order for* 10 l. is good, and aſſignable; for it is tantamount to, I promiſe to pay, &c.

R. 11 Geo. 2 Mod. Ca. 362. But I promiſe to pay 70 l. or ſurrender *A.* is not aſſignable; for it may be ſatisfied by the ſurrender.

2 Mod. Ca. 263. Or, I promiſe to pay 10 l. to *B.* if my brother does not by ſuch a day.

(*c.*) *When a Bill, &c. shall be* Payment.

IF a bill of exchange, or promissory note be given to another, and *accepted* as *money*, it will be a good payment. 4 Com Dig. 105. (F. 17)

So if *A.* sells goods to *B.* who agrees to deliver a bill, or note for his satisfaction; if the bill, *&c.* be delivered, it will be a payment, though the bill be never paid. 1 Sal. 124.

So, if *A.* gives his own bill of exchange upon *B.* to *C.* payable to *C.* *or order*, for value received, who keeps it for 2 years, it will be a payment; for if he does not resort to *A.* in a convenient time, it shall be presumed, that he is satisfied with the bill. Per Holt, Sho. 155.

By the Stat. 3 & 4 *Ann. c.* 9. an inland bill accepted for satisfaction of a debt, shall be deemed full payment, if the person accepting it take not due course to obtain payment, by endeavouring to get it accepted and paid, or protested.

But, regularly, a bill or note given to a creditor shall not be a discharge of the debt, 'till payment; unless it be *accepted* in *discharge*; 1 Sal. 124. For, without an express agreement to take it in *discharge*, the acceptance is only, upon condition if it be paid. Sal. 442. Skin. 410.

So, if *A.* being indebted to *B.* indorse a bill of exchange, and send it to him; it will not be a payment, though it continue in his hands a long time after it is payable. R. 1 Sal. 124.

And *B.* may afterwards sue *A.* for his debt; and such bill shall not be allowed in satisfaction. Per Holt, 1 Sal. 124.

R. Mod. Ca. 36. Sal. 442.

So, if a bill, sent to a goldsmith by a servant, be paid in part, and another bill given for the residue; the acceptance of the other bill by the servant will not be a payment for the residue, if the other bill be not paid.

R. Mod. Ca. 36, 7.

Though the master send his servant the next day to receive such bill.

R. Sal. 442.

So, if a bill or note be given and received, generally for a debt, it will not be a payment, if the goldsmith fails before the money paid; though the goldsmith continues to pay all the same day; for he, who takes it, is not bound to receive it immediately, but shall have a reasonable time for it.

R. Eq Ca. *60. 2d Part of * 2 Mod. Ca.

So, if a bill be given generally, upon *B.* a goldsmith about ten in the forenoon upon *Saturday*; and the receiver sends all his bills that day received by his servant, who receives several sums upon them and enters them; and then it is five in the afternoon, after which time it is not usual for goldsmiths to pay upon a *Saturday*, as they adjust their accounts at that time, for which reason he does not send the bill to *B.* 'till ten on *Monday* morning; and *B*'s cashier cancels the bill, and directs the servant to come half an hour afterwards; but then, and upon two subsequent demands does not pay; but in the afternoon upon *Monday* gives another bill of the same date, and for the same sum, at which time he was a bankrupt: this bill will not be payment, though the servant was in fault, because he did not stay to receive the money when the bill was cancelled.

Moore v. Warren, and Holme v. Barry, H. 7 G. Str. 415.

If defendant gives plaintiff a goldsmith's note at two in the afternoon, and next morning at nine it is tendered, a quarter of an hour

hour after they had ftopt, it is not payment.

Turner v. Mead, coram Pratt, C. J. H. 7 G. Str. 416. Contra, Hayward v. the Bank of England, coram King, C. J. P. 9 G. Str. 550.

The common ufage in tranfacting affairs of this nature, is to be chiefly regarded; fo where it is the cuftom of a company (as it was of the *Bank* and of the *Sword-blade Company*) to fend their fervant in the morning to leave the notes, and to call for the money in the afternoon, if the goldfmith has ftopt payment after the notes left, it is not payment.

If a man receives a goldfmith's note at two on *Saturday*, and does not demand it 'till *Tuefday* morning, it is payment.

Manwaring v. Herriman, H. 8 G. Str. 508.

If a man receives a goldfmith's note, at twelve, puts it into the Bank at one, next morning at ten it is carried with others for 2600l. and left as ufual, called for at eleven, and at two, payment refufed, but they pay fmall notes for two hours after; this is not payment.

Hoare v. Da Cofta, T. 5 G. 2. Str. 910.

If *A.* indorfes a promiffory note to *B.* who gives a receipt, "Received the contents when the above bill is paid," and keeps it from 28th March, when it became payable, to 13th May, when the giver of the note fails, it is good payment by *A.*

Smith v. Wilfon, P. 11 G. 2. Andr. 187.

A goldfmith's note, paid in at half paft eleven, and not demanded 'till next day at two is payment.

Eaft India Com. v. Chitty, M. 16 G. 2. Str. 1175.

And fo a bill accepted, by writing an order on his goldfmith to pay it when due, is payment, if not tendered in the fame time as a note or draft. *Vide fupra, & infra.*

Bifhop v. Chitty, T. 16 G. 2. Str. 1195.

A banker's note paid after dinner, and refufed payment next morning at nine, is not payment. *Vide fupra.*

Fletcher v. Sandys, H. 19 G. 2. Str. 1248.

If a creditor takes a draft from his debtor, on another, though it is not payable to him, or

Chamberlyn v. Delarive, T. 17 G. 3. 2 Will. 353.

or order, and keeps it an unreasonable time, and drawee breaks, yet it is payment.

Upon the whole, I think the case of *Tindal* and others v. *Brown*, *Post* Essay II. *V*. being the last determination upon the question, " what is reasonable notice," and as having undergone great and frequent consideration, may be considered as a governing case. By that case it seems, that the notice must be given by the holder of the bill, to shew he does not mean to give credit to the indorser, or person from whom he received the bill.

[5.] Of

[5.] *Of other writings without seal of various kinds.*

AN *affidavit* of a person deceased was allowed to be read in confirmation of other evidence, to prove his marriage at the *Fleet*, though taken before a surrogate, when there was not any thing before the ecclesiastical court. Sacheverell v. Sacheverell. March, 1716. Court of Delegates. Str. 35.

A *certificate* of the commissioners for stating the army debts, conclusive. Moody v. Thurston, M. 8. G. Str. 481.

But it must be signed by them sitting upon the commission. Mountcan v. Willson, T. 9 G. Str. 568.

Corporation books, when publicly kept as such, and the entries made by the proper officer, are evidence. Rex v. Mothersell, E. 4 G. Stra. 93.

A *survey* taken by one, under whom the party producing it claims, not evidence, the other party not being privy. Anon. E. 4 G. Str. 95.

A *visitation* made by the heralds, entered in their books, and kept in their office, evidence of a pedigree. Pitton v. Walter, H. 5 G. Str. 162.

So the *minute book* of a former visitation, signed by the heads of the several families, and found in a private library. (Ld. Oxford's) Ibid.

Copies of *corporation books*, or of a *poll*, are evidence; and in that case *B. R.* will not order the original to be produced without particular reason. Brocas v. Mayor and Aldermen of London. P. 6. G. Str. 307.

A *letter*, fifty years old, found in the corporation chest, is not a corporate act, so as that a copy of it may be evidence, but the original must be produced. Rex v. Gwyn, M. 7. G. Str. 401.

Bonnet v. Trappes, H. 1723. Bunb. 143.

On an issue to try a *modus*, the plaintiff may be ordered to produce the *books* of former *rectors*, if they have been produced at the hearing.

Shelling v. Farmer, M. 12. G. 1. Str. 646.
Murray v. Thornhill. M. 13. G. Str. 717.

A company (as the *East-India* company) shall not be obliged to produce *books* of *letters* in a cause where they are not concerned.

Downs v. Moorman. H. 1724. Bunb. 189.

The copy of an old *agreement* admitted, where the original was in the Bodleian library, whence the *Oxford* statutes prohibit it to go out.

Bp. Hereford v. D. Bridgwater. T. 1729. Bunb. 269.

A defendant lord of a manor, who insists on a *modus*, is not obliged to produce *court-rolls* to shew what proportions of it are paid by the other defendants, tenants of the manor.

Str. 826. 2 Ld. Raym. 1370.

An *indorsement* on a *bond* of *interest* paid within 20 years is evidence, though under the hand of the obligee, if it was made before it could be thought necessary to encounter the presumption. *Searle* v. Ld. *Barrington*, H. 2. *G.* 2. affirmed in the exchequer-chamber, and in parliament.

Turner v. Crisp. 13 G. 2. Str. 827.

But if the indorsement is after the presumption has taken place, it is not evidence.

Crew v. Saunders H. 6 G. 2. Str. 1005.

The *post-office* is not obliged to produce *books* in suits where it is not party.

Per Probyn and Lee J. contra Page J. May v. May. P. 10. G. 2. Str. 1073.

If there is a general *register*-book of a parish, into which the entries of baptisms are made every three months, from a day-book into which they are made immediately, the first is the register and evidence, and the *day-book* not, though they differ, or any thing omitted in the *register* which appears in the day-

day-book, as *B. B.* to ſignify baſe-born. *Vide ante, Wills.* A. II. (II.) [1.]

A *bill* of *parcels* from a merchant abroad, with his *receipt* to it proved, is evidence of property in an action on a *policy* of *inſurance.* Ruſſel v. Boheme. H. 13. G. 2. Str. 1127.

An *entry* in an *attorney's debt-book* may be read after his death, to prove that a deed was made. Warren v. Greenville. P. 13. G. 2. Str. 1128.

A plaintiff ſhall be obliged to produce his *books* relative to his dealings with defendant. *Sed qu.? I conceive all that can be done is to give parol evidence, if they are not produced.* Goater v. Nunnely. P. 13. G. 2. Str. 1130.

Plaintiff in treſpaſs for diſtreſs for a fine ſet by the lieutenancy of *London,* ſhall have leave to inſpect their *books* and take copies, but the commiſſioners ſhall not attend with the books. Edwards v. Veſey. T. 8. G. 2. B. R. H. 128.

The court will not make a rule to inſpect the *books* of a *company* plaintiff, if it is not a public company, but defendant may give notice to have them produced at the trial. Charitable Corporation v. Woodcraft. T. 8. G. 2. B. R. H. 130.

If there is a rule *niſi* for information *quo warranto,* the court will make a rule for defendant to inſpect the *charter* and *corporation books.* Rex v. Holliſter. P. 9. G. 2. B. R. H. 245.

An *entry* in a *bankrupt's* books, before the act of bankruptcy, is evidence of a debt owing by him to the petitioning creditor. Ewer & al. aſſignees of Winter v. Preſton. Per Willes, C. J. T. 10 & 11 G. 2. B. R. H. 378.

A leſſee of the dean and chapter of *Canterbury* defendant, in *ejectment,* at the ſuit of their truſtee, ſhall not have liberty to inſpect their *books.* Ord v. Stubbs. T. 11 & 12 G. 2. Andr. 247.

On a rule to ſhew cauſe againſt an information *quo warranto* by what right defendant claims to hold a *court-leet* in a borough, defendant ſhall not have a rule to inſpect the Rex v. Bridgeman. H. 17. G. 2. Str. 1203.

 corporation-

corporation-books, for it is a matter of private claim between the parties.

Rex v. Cornelius. T. 17. G. 2. Str. 1210. On an information against *justices* of a *corporation*, for taking money for granting *ale-licences*, prosecutor shall not have a rule to inspect the *corporation-books*.

Smith v. Davis. T. 18. G. 2. 2 Wils. 104. If the lord of a manor brings *ejectment* for lands, claiming them as copyhold, against defendant, who claims them as freehold, defendant shall not have a rule to inspect the *court-rolls*.

Vicar of Kilington v. Trin. College, T. 25. G. 2. 2 Wils. 170. A *survey* of a religious house (in the First Fruits Office) though the commission is lost, good evidence to prove a vicar's right to small tithes.

Barnes, 235. An elector, officer in the Post-Office, sued on 9 *Ann.* has a right to inspect *corporation-books* where the freemen's names are inrolled, and to take copies.

Barnes, 236. The *books* of a *company*, not a corporation, nor trustees for a party, shall not be inspected.

Barnes, 439. Defendant, holder of stakes at a horse-race, shall give plaintiff copy of the *racing articles*.

Barnes, 468. The court will order a *justice* of peace to give a copy of an *information*, and to produce or cause to be produced, the original (at trial for a malicious prosecution and imprisonment against the informer) and the constable to produce, or cause to be produced, the *warrant*.

Rex v the Hostmen of Newcastle. H. 18. G. 2. Str. 1223. Every member of a *corporation* has a right to look into the *books* of the corporation for a matter that concerns himself, though the corporation is not a party in the dispute.

Barnes, 236. A stranger affected by a *by-law*, has a right to inspect and take copies.

On information by the *attorney-general* against the vice-chancellor of *Oxford* for misdemeanor in his office, the crown shall not inspect the *archives* and *statutes* of the university. Rex v. Purnell, H. 22. G. 2. 1 Wils. 239.

. Every one has a right to inspect the *books* of the *sessions*, for they are public books. Herbert v. Ashburner, H. 24. G. 2. 1 Wils. 297.

A writing without stamps (being an agreement "that *A.* and partners shall work mines "in *B.*'s ground, and *B.* to have a propor-"tion, and to be also partner for an eighth,") which is not a lease nor an assignment, may be given in evidence on trespass brought by *A.* against a stranger. Harker v. Birkbeck, T. 4. G. 3. 3 Burr. 1556.

Qu. as to *stamps* since 23 *G.* 3. *c.* 58. *sect.* 1.?

[B.] *Of* PAROL EVIDENCE, *viz. of* WITNESSES, they are

I. COMPETENT.

[1.] *Credible.*

[2.] *Of doubtful credit.*

II. Not COMPETENT.

[1.] *Infamous.*

[2.] *Interested.*

[3.] *Wanting discernment.*

[4.] *Counsel, Attornies,* and *Solicitors,* who are intrusted by their clients.

I. COMPETENT.

[Under this head the two classes of witnesses, credible and of doubtful credit, are unavoidably considered together.]

Blackst. Com. L. III. c. 23.

ALL witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as we have already enumerated as *not* competent: all others are *competent* witnesses, though the jury, from other circumstances, will judge of their credibility. *Vide infra.*

Co. L. 6. b.

It was formerly supposed an *infidel* could not be a witness.

Fachina v. Sabine. Str. 1104, & vide Omichund v. Barker, in Canc. Wils. 84. 1 Atkyns, 19.

But good sense hath since prevailed, and *Mahometans* have been admitted and sworn on the *Koran,* in one case where two chief justices were present in council.

In

In acts of parliament which direct convictions upon the oath of witnesses, the epithet "*credible*" is added, but it is not by any means intended to signify "competent;" *that* is implied in the term "*witness*." But it is intended (from abundant caution) to declare, that though competent witnesses swear positively, *their credibility is to be weighed*; and if the magistrate thinks the evidence *not credible*, he ought not to convict. D. per Lord Mansfield. Wyndham v. Chetwynd. 1 Burr. 414.

Notwithstanding the very high respect we have for Lord *Mansfield*, we cannot help referring the reader to the argument of Lord *Camden* in the case of *Doc. Ex. Dm. Hindson, & Ux. & al.* v. *Kersey, E. T.* 5 *G.* 3. 1765, *C. P.* And the case of *Hilliard* and *Jennings*, (*L. Raym.* 505. *Com. Rep.* 90, 94. *Carth.* 514. 12 *Mod.* 277. *Freem.* 509.) in which last case the court of King's Bench not only declared the two words *credible* and *competent*, to mean the same thing, but rested their main argument upon *that* very meaning of the word *credible*. Published in 4to. A.D. 1766.

And here, having mentioned Lord *Camden*'s argument, it may be very proper (in a work of this kind) to state his opinion at large as to the meaning of the word *credible*. He says,

"I understand the word *credible* to mean *worthy of credit*. When applied to the person of a witness, it bespeaks him to be a person of capacity to deserve credit, I say, of capacity to deserve it, I go no further, because no man can be sure of obtaining credit, let him be ever so *credible*; and, therefore, I suspect that the word *credible* has been used improperly in the last passage * for credit, which means a great deal more. Fo. 27, & seq.

* Alluding to a passage in Lord Mansfield's argument.

"Now

" Now a witneſs is *credible* in two ſenſes.

" 1ſt. When this quality is predicated of him, or denied to him in the abſtract, without referring to the teſtimony of any particular fact.

" 2d. He is *credible*, or not, in another ſenſe, when the matter of his teſtimony, in a particular caſe, comes to be diſcuſſed and tried.

" A man therefore may be *credible* in the firſt ſenſe, though not *credible* in the ſecond, and yet the word properly uſed in both.

" When you apply this epithet to legal witneſſes, that law, where it is ſo applied, muſt determine the meaning.

" Now, if I aſk this general queſtion, who are *credible* witneſſes by the law of *England*, *i. e.* perſons worthy to obtain credit? If the queſtion is not abſurd, I can give but one anſwer to it, all ſuch perſons as are permitted to give teſtimony in the courts of juſtice. Who not *credible*? Thoſe who are not permitted.

" The very admittance of the perſon to be examined, proves him, in the eſtimation of law, worthy of credit, while he ſtands unimpeached, by calling him *competent*.

" But when a witneſs's teſtimony is under trial, and I am aſked, Whether ſuch a deponent is a *credible* witneſs to thoſe facts? I muſt take in a thouſand circumſtances in order to judge fairly of his credibility *quoad hoc*.

" In this caſe I admit that you pre-ſuppoſe the evidence given, becauſe his credibility then depends not only upon his perſonal character, but likewiſe upon the evidence given, with many other circumſtances.

" This

"This general character of credibility in the abstract, is so inseparable to the person of a disinterested witness, that nothing but an infamous judgment can deprive him of it: he is disbelieved in one cause, he is notwithstanding a *credible* witness in the next; he fails there, yet in a third he may obtain credit; let his conduct or general character be what it will, he is a *credible* witness to every fact wherein he has no interest.

"When I say that all indifferent witnesses are *credible*, I do not mean equally so, for credibility may have its degrees; his rank or character may make him more or less *credible*, but it is sufficient for my purpose if the worst is intitled to any degree of credibility.

"Now where a man's testimony is impeached, this general character of credibility is no longer considered otherwise than as a circumstance, and the inquiry is changed into a scrutiny of his credibility to that particular fact. And here men of all ranks, character, and fortunes, are equally liable to the same inquiry; it is by no means a consequence that the best man should turn out the most *credible* witness; every day's experience proves the contrary, and a bad man is not only allowed to be a good witness, but sometimes even a better than a much better man.

"In this place it is proper to observe, that the good character of the man has been confounded with the credibility of the witness, which are two different things, for the statute was never so simple as to require the attestation of honest men, a matter impossible either to be known or tried; but only demanded

indifferent

indifferent witnesses, a description equally understood, and plainly triable; indeed, every man living is honest enough to tell the truth for a third person, if he has no motive to do otherwise.

"Nor is it strange that a bad man, in some cases, should be a *credible* witness, and a good one not credible; for credit is not in the power of the witness, but is lodged in the third person, and is a matter of the nicest and most difficult discussion.

"The slightest circumstance may turn the balance; probability in the tale, collateral conformations, or impeachment by other evidence, contrary declarations, tamperings, the confident or modest demeanor of the witness, hesitation, confusion, prevarication, self-contradiction, compared with the contrary behaviour: these, and many other considerations, conspire to create or destroy belief; and therefore the general character of the man is of no great moment in weighing the credibility of his testimony; for I appeal to experience, whether general character is ever called in to impeach * a person's evidence, 'till some strong attack from another quarter is made to his credit? and therefore every man, without exception, who is free from all interest in the fact he comes to attest, is a *credible* witness, *i. e.* he deserves credit; nay, he is always believed, unless some other objection, besides character, is raised against his testimony."

* Q. support.

So far Lord *Camden*:—let us see what others have said upon the subject.

P. Lord Hardwick. An. 359.

To be a witness one need not be so absolutely indifferent, as to be a juror; and the

reason is, because you may make the objection to his credit; but if a juror be once sworn, he stands equally a juror with the rest.

Lord Hardwicke, when an objection was made to the *competency* of a witness at *nisi prius* before him, was always inclined to restrain it to the *credit*, rather than the *competency* of the witness, unless it was like to introduce great perjury, because it tends to let in light to the cause, and there may be still an objection made to his competency. An. 360.

The distinction between jurors and witnesses is established by the 1 *Inst*. 6. *b*. there *int*. *al*. though the witness be of the nearest alliance, or kindred, or of counsel, or tenant, or servant to either party (or any other exception that maketh him not infamous, or to want understanding or discretion, or a party in interest,) though it be proved true, shall not exclude the witness from being sworn; but he shall be sworn, and his credit upon the exceptions taken against him, left to those of the jury who are triers of the fact. *Sed qu*. as to counsel, *&c*. V. Hale's H. P. C. 280. An. 360, 1. V. ante General rules of evidence. V. post, rules of evidence in criminal cases.

It seems (*a*) agreed that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the (*b*) judges who is to try him; and therefore in the case of (*c*) *Hacker*, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial.

(*a*) 2 Hawk. P. C. 432.

(*b*) A commissioner by virtue of a commission out of Chancery, may himself be examined as a witness at the commission, but then he must be examined first by the other commissioners, after which he may proceed in the execution of the commission. 2 New Ab. 286.

(*c*) Kelynge, 12. 1 Sid. 133. Style, 233

2 New Ab. 287. It is not any exception to a witneſs that he is one of the jurors; but then he is, if called upon, to give his evidence on oath openly in court, and not to be examined privately by his companions.

II. Not

II. Not Competent.

[1.] *Infamous.*

THEY are ſuch as may be challenged, as jurors, *propter delictum.* Challenges *propter delictum* are for ſome crime or miſdemeanor, that affects a man's credit, and renders him infamous, as for a conviction of treaſon or felony. Co. L. 6. b.

Of piracy. 2 Rol. 686. l. 27.

Though it be to excuſe a man accuſed falſely by him, and by the inſtigation of another. Id. l. 30.

But a perſon pardoned for his treaſon or felony will be a good witneſs, for the pardon takes away *pænam & reatum.* Ray. 369. 1 Vent. 349.

So, if he be burnt in the hand for felony, for that is *quaſi* a pardon by ſtatute, and proof of the record whereby clergy is granted, is ſufficient, without proving that he was burnt. *Per Trev.* 7 *An.* Ray. 369, 380. Keil. 37. Sti. 388. 5 Com. Dig. 517.

So, an accomplice for the ſame crime before conviction, though he has a promiſe of pardon, and the promiſe be not made for his evidence. Keil. 17, 18. V. poſt Rules of evidence in criminal caſes.

But a man infamous in any reſpect ſhall not be a witneſs, as if he be attainted of a falſe verdict. Co. L. 6. a.

If he is convicted of *forgery* upon the *St.* 5 *El.* 14. or otherwiſe. Co. L. 6. b. 5 Mod. 74.

The affidavit of one convicted of *forgery* cannot be read to ſupport a complaint, but it may to defend himſelf againſt a complaint. *Vide infra.* Walker v. Kearney. H. 14. G. 2. Str. 1148.

Co. L. 6. b. If the witness is convicted of a *conspiracy* at suit of the King, he shall not give evidence.

Ibid. Or convict in *premunire*.

By the st. 5 *El.* 9. if convicted for *perjury* or subornation, 'till the judgment reversed.

Co. L. 6. b. So if convicted of *perjury* at the common law.

Ibid. 1 Mod. 74. Salk. 461. So if he had an *infamous judgment*, and upon that stood in the *pillory*, or tumbrel.

Co. L. 6. b. Or be *stigmatized*, or lose his ears.

5 Com. Dig. 516. Or be whipt for *petit larceny*. Per St. John at Suss. ass. 1657.

Pendock Ex Dim. Mackinder v. Mackinder et al. H. 28 G. 2. Barnes, 467. In ejectment, verdict for plaintiff as to a fourth part of the premisses, subject to the opinion of the court upon this point reserved at the trial, *viz.* whether a person convicted of *petit larceny*, and who had undergone the punishment of whipping, was, or was not a competent witness to a will, whereby the premisses in question were devised? The court held the person convicted not to be a competent-witness. *Petit larceny* is *felony*; it is a crime equal to *grand larceny*, if not worse, because the temptation is less to steal little than much; it springs from an evil mind.

3 Lev. 426. Salk. 689. A man is not a witness, if he have judgment of the *pillory*, though he did not stand there.

Salk. 690. Or be convicted of *barretry*, though only fined, for the crime makes the infamy.

1 Vent. 349. Salk. 689. 5 Com. Dig. 517. So though pardoned after a conviction of *perjury*, he shall not be a witness, for there the disability is part of the judgment.

3 Lev. 426. So a pardon of any crime after examination of the witness, and his testimony given, does not make his testimony good.

So,

So, regularly, an affidavit of such a person in any cause shall not be admitted. 5 Com. Dig. 516.

But a conviction of *felony*, *perjury*, *&c.* does not take away his testimony, unless the record be produced. Ibid.

So a record, by which he is found guilty by verdict, is not sufficient, if judgment be not entered. [illegible]

So if he stood in the *pillory*, where the judgment was not infamous, it does not take away his testimony; as, for a libel, or words in slander of the government. 3 Lev. 4[illegible]. 5 Mod. 75.

So a man *outlawed* in a *personal* action. Co. L. 6. b.

So the *pardon* of an *offence* enables him to be witness (except in perjury, as before observed) as, if the felony, *&c.* of which he is convicted, be pardoned. 1 Vent. 349. Salk. 689.

So a *pardon* of perjury by act of parliament enables him. *Per Holt* Salk. 689.

So if there be not a *legal* objection against a witness, other scandal to his credit shall not be allowed; as, that he is a whoremaster, drunkard, &c. Mar. Pl. 1[illegible]6.

An affidavit of one convicted of *perjury*, &c. shall be allowed to prove a male practice against him. *Vide supra.* Salk. 461.

[2.] *Interested.*

Bl. Com. L. iii. c. 23.

INTERESTED witnesses may be examined upon a *voir dire*, (*veritatem dicere*,) if suspected to be secretly concerned in the event, or their interest may be proved in court; which last is the only method of supporting an objection to the *former* class; for no man is to be examined to prove his own infamy.

Interest arises from, and is connected with so many, and such a variety of circumstances, that it is morally impossible (at least so it appears to me) to form a clear and intelligible arrangement, therefore it hath not been attempted here. The cases are, however, given, *i. e.* such as appear in our printed books; or rather, short abstracts of them.

The following may, in some measure, be considered as a *general rule*, but, like all other such rules, liable to exception. It is, that

Per Hardwicke, C. J. on consideration. Rex v. Bray, H. 10 G. 2. B. R. H. 358.

The true notion of who may be a witness, may be gathered from the questions on the *voire dire*, *viz.* whether he is to *get* or *lose* by the event of the suit; if he can answer that fully, he must be a witness.

Ibid.

To be a witness one need not be so absolutely indifferent, as to be a juror; for the *credibility* of a witness may be objected to, but not so of a juror.

Fotheringham v. Greenwood, M. 5 G. Str. 129. V. Salk. 283.

A person who apprehends himself interested, though *stricto jure* he is not, is no witness.

A

A ſervant, for beating of whom the maſter has brought treſpaſs. *Sed qu.?* If this is law? Dunſley v. Weſtbrowne, H. 7 G. Str. 414. Sed vide Duel v. Harding, T. 10 G. Str. 595. contra. and ſo in Lewis v. Foy, M. 6 G. 2. Str. 944.

The party who excepts to a witneſs, may call him afterwards. Atwood v. Dent, M. 8 G. Str. 480.

A wife may be a witneſs to prove her daughter's wedding-clothes delivered on her huſband's credit. *This was in an action againſt the daughter's huſband. Had it been an action againſt the father, the defendant's wife could not have been called as a witneſs.* Williams v. Johnſon, H. 8 G. Str. 504.

A wife ſhall not be a witneſs for or againſt her huſband, though with conſent. It is to preſerve the peace of families. Baker v. Dixie, P. 9 G. 2. B. R. H. 264.

Wife of *Prochein amy* allowed. Denniſon v. Spurling, B. R. Stra. 506.

But, *per* Lord *Hardwicke*, in a ſubſequent caſe, *Prochein amy* cannot be witneſs for the infant. Hopkins v. Neale, H. 9 G. 2. Str. 1026.

Guardian on record, not allowed. Clutterbuck v. Ld. Huntingtower, C. B. H. 8 G. Str. 506.

In an action againſt the maſter, the ſervant to whom the goods were delivered, allowed to prove payment by a third perſon. Brownſon v. Avery, H. 8 G. Str. 507.

Creditor of bankrupt not allowed to prove him a gameſter. Shuttleworth v. Bravo, H. 8 G. Str. 507.

Infant declares *per gardian*, he being liable to coſts; what he ſaid may be given in evidence by defendant. James v. Hatfield, H. 9 G. Str. 548.

The defendant in an action aſſigned for error, that the plaintiff died before judgment; and to prove it he called the wife * of the plaintiff, and the Chief Juſtice allowed her to be a witneſs. *Quære tamen*, for that is begging the queſtion which was then to be tried. *The above is an exact copy of* Strange's *report of the caſe.* Dale v. Johnſon, at niſi prius in Middleſex, Coram Pratt. C. J. Stra. 568.

* Surely he means the widow. If ſo, where is the doubt upon the caſe as here ſtated?

Ball v. Bostock, M. 10 G. Str. 575.

A. delivered *South Sea* bonds to *B.* from whom they were stolen; *C.* a clerk stopped them, when *D.* brought them for the interest; *D.* brought trover against *C.* who at trial called *B.* to prove the property in *A.* but he was refused, having made himself liable to costs in the action, by giving bond to indemnify the company for stopping the bonds; then *A.* brought trover against *D.* and *B.* was admitted as a witness.

Stevenson v. Nevison, P. 10 G. 2 Ld. Raym. 1353. Str. 583.

Where two qualifications are necessary to be elected, he who has only one of them may be a witness to prove it.

Rex v. Moise, T. 10 G. Str. 595.

On an indictment for destroying a note, the proprietor may be a witness.

Shank v. P[illegible], T. 11 G. Str. 633.

The party to an usurious contract cannot be a witness on an action to prove the repayment of the money.

Rex v. Azire, T. 11 G. Str. 633.

A wife may be witness against her husband, indicted for an assault on her.

Rex v. Fletcher, T. 11 G. Str. 633.

If two are indicted, one submits and pays a fine, he may be witness for the other.

Martin v. H[illegible], M. 11 G. Str. 647.

A goldsmith's servant who had overpaid a note, allowed.

Norcott v. Orcott, M. 1[illegible] G. Str. 6[illegible].

Creditors to prove defendant not intitled to the benefit of an insolvent act, allowed; because the plaintiff in this action was the only person concerned in the event of the cause. The Chief Justice said, it would go to their credit, but not to their competency.

Powell v. Hord, M. 12 G. Str. 650. 2 Ld. Raym. 1411.

The bailiff who had a warrant to arrest, not allowed to prove an attempt to arrest, on action against the sheriff for a false return.

Rex v. Fox, M. 12 G. Str. 652.

Prosecutor on an indictment, though he has laid a wager that he convict defendant, allowed.

Infant

Infant under ten, very seldom, and under nine, never admitted to be a witness either in capital cases, or lesser offences. *Sed vid. tit. general rules of evidence & infra.* — Rex v. Travers, Per Gilbert, C. B. & Raymond, C. J. P. 12 G. Str. 700. Cont. Rex v. Powell,

S... v. Brazier. 2 L. Hawk. 612. (S. 27.)

On an indictment for forging a letter of attorney, whereby he transferred *A.*'s stock, *A.* may be a witness, for the Bank indemnify him. — Rex v. Rhodes, M. 13 G. Str. 728.

If bail is a *subscribing* witness, he shall be obliged to give evidence, otherwise not. — Hawkins v. Perkins, M. 7 G. Str. 406.

Vendor without covenant for good title, or warranty, may be witness to prove title of vendee. *Sed qu.? If the sale was bona fide, whether a covenant or warranty is not implied by law?* — Busby v. Greenslade, T. 7 G. Str. 445.

On an information for importing teas contrary to the act of navigation, the master of the ship produced by defendant, but not allowed; because the ship is forfeited by the act, though there was no information against it. — Fuller, qui tam, v. Jackson, M. 1723. Bunb. 14.

E contra, master of a cart, though forfeited for running goods, allowed. *Vide* the next case. — Ibid.

On an information for importing *India* silks, master of the ship not allowed, though no prosecution commenced against him, because an abettor, and liable to 500*l.* penalty. — R... v. Sandwich, H. 1723. Bunb. 140.

On information for importing brandy in unsizeable casks, master of the ship not allowed, though no information filed against him; for he is liable to 100*l.* penalty for breaking bulk. — Snoop v. Fanning, M. 1725. Bunb. 203.

A bankrupt cannot prove his own act of bankruptcy. — Field v. Curtis, H. 2. G. 2. Str. 829.

 On

Rex v. Nunez, P. 9 G. 2. Str. 1043. B. R. H. 265.

On indictment for perjury for denying in an anſwer an agreement not to put a note in ſuit, the giver of the note, defendant at law, and plaintiff in equity, cannot be witneſs. *Sed qu.? If the debt and coſts in law and equity are paid, and the proceedings at an end?*

Cock v. Wortham, M. 10 G. 2. Str. 1054.

In an action by a father for deflowering his daughter, *per quod ſervitium amiſit*, the daughter may be witneſs.

Rex v. Robins, H. 10. G. 2. Str. 1069.

Member of a corporation who has acted under the right claimed, but has no intereſt, may be a witneſs to prove the uſage.

Jarvis v. Hayes, M. 11. G. 2. Str. 1083.

On action brought againſt a maſter, for his carman's driving his cart negligently, *per quod, &c.* the carman may be witneſs for his maſter.

Hall v. Hill, T. 11 G. 2. Str. 1094.

A wife's owning receipt of money due to her huſband for wages earned by her, no evidence in an action brought by the huſband.

Rex v. Frederick, T. 11 G. 2. Str. 1095.

The wife of one defendant cannot be witneſs for the other, on an indictment againſt two.

Rex v. Ellis, M. 12 G. 2. Str. 1104.

Defendants in ejectment againſt whom a verdict has been given, cannot be witneſſes for the proſecutor, on indictment for perjury at that trial. *Vide qu. ſupra, upon an indictment for perjury.*

Lloyd v. Williams, P. 8 G. 2. B. R. H. 123.

In order to take off the teſtimony of a perſon joined in the *ſimul cum*, evidence muſt be given of his being ſome way concerned in the fact, that proceſs has iſſued againſt him, and endeavours been uſed to take him.

Hill v. Fleming, P. 9 G. 2. B. R. H. 264.

He may be admitted, if plaintiff does not ſhew he has been ſerved. *Sed vide the preceding caſe.*

Collett v. Jennis, T. 8 G. 2. B. R. H. 133.

If defendant's bail is a material witneſs, the court will permit his name to be ſtruck out, on another entering into the recognizance in his room.

This

This cannot be done at nisi prius, but must be done before the cause comes on to trial.

The court will not give leave to strike out the name of a defendant in ejectment, on affidavits, that he is not interested in the premisses, and is a material witness for the other defendants, especially if the jury process and *subpœnas* have issued. Barrington v. Parkhurst, M. 9 G. 2. B. R. H. 162.

If an informer is to have the penalty, his oath is not evidence. Rex v. Moore, M. 9. G. 2. Rex v. Collins, B. R. H. 176.

The party who supports the cause cannot be a witness. Hopkins v. Neale, H. 9 G. 2. B. R. H. 202.

A creditor of a bankrupt who has released his debt to the assignees, but not to the bankrupt, may be a witness to prove the bankruptcy. Ambrose v. Clendon, P. 9 G 2. B. R H. 267.

What a bankrupt said of his bad circumstances, is not evidence, unless spoken when he was removing his goods, &c. B. R. H. 267.

A mother may be witness to prove her marriage, when her son's legitimacy is in question. Stapleton v. Stapleton, T. 9 G. 2 B. R. H. 27[illegible].

A person indicted pleading misnomer, and for want of replication discharged, may be witness for the other defendants. Rex v. Sherman, T. 9 G. 2. B. R. H. 303.

A man's having a bare authority, without interest, will not hinder his being a witness, if he is not a party. Per Hardwicke, C. J. on consideration. Rex v. Bray, H. 10 G. 2. B. R. H. 358.

An office is always an interest. Ibid.

A man may be a witness, though he is liable to an information for a past fact, to which the trial relates. *Sed vide ante.* Ibid.

An elisor named by a former mayor, to return a jury of freemen to elect a new mayor, or one of the jury so returned, may be witness for the new mayor, defendant in an information, *quo warranto.* Ibid.

Rex v. Broughton, P. 18 G. 2. Str. 1229. The party supposed to be defrauded may be a witness, on an indictment for perjury.

Dean of Ely v. Stewart. T. 1740. 2 Atkyn, 44 Per Lord Chan. Hardwicke. If a witness is examined by the party producing him to one point only, the adverse party may cross-examine him to that, but not use him, to prove a different fact. *Qu.* (at common law) *if at nisi prius the contrary is not every day's practice?*

Rex v. Mayor of Oakhampton, T. 25 & 26 G. 2. 1 Wils. 332. A father, who has gained his freedom in a borough by servitude, is a good witness to prove a custom whereby his eldest son is intitled to his freedom.

Wright v. Littler M. 3 G. 3. 3 Bur. 1244. The confession of a person on his death-bed, of a forgery committed by him, of an instrument attested by him, is evidence (to set aside that instrument) proper to be left to a jury.

Frost v. Whadcock. Barnes, 447. Leave to examine an ancient witness before a judge, cannot be without consent.

Cart v. Pearce, 2 Blackstone. Bines, 1766. 3 Durnf. & East, A co-obligor in a bond to the ordinary, under 22 & 23 *Car.* 2. *c.* 10. is a competent witness to prove a tender by the administratrix.

DECLARATION for work and labour, and for money paid, laid out and expended.

Pleas the general issue, except as to 2 l. 5 s. and as to that a tender by the defendant; on both which, issues were joined.

This cause was tried at the last assizes at *Salisbury*, before HOTHAM Baron, when a verdict was found for the defendant, subject to the opinion of the Court, on a *Case*—which stated that the sum of 2 l. 5 s. was tendered to the plaintiff by one *Wood*, who was one of the defendant's securities by bond in the ecclesiastical court for her duly administering the intestate's effects.

 The

The queſtion for the opinion of the court is—Whether the ſaid *Wood* was a competent witneſs for the defendant?

Jekyll for the plaintiff.

Gibbs for the defendant.

The court ſaid no queſtion could be entertained about the competency of *Wood*'s teſtimony; and that if a creditor of the adminiſtratrix had been offered as a witneſs, (which was a ſtronger caſe) there could have been no objection to his evidence being received. The bare poſſibility of an action being brought againſt a witneſs, is no objection to his *competency*. And,

BULLER, *J.* added, that this was not like the caſe of bail, becauſe they are directly and immediately intereſted; for if a verdict be given againſt the principal, the bail become immediately anſwerable.

In order to ſhew a witneſs intereſted, it is neceſſary to prove that he muſt derive a *certain* benefit from the determination of the cauſe one way or the other. Then in this caſe, ſuppoſing there were no aſſets, though the defendant would be anſwerable for the coſts, ſhe would not be liable on her bond to the eccleſiaſtical court. She is only bound to diſtribute the inteſtate's effects, and it does not appear in this caſe how ſhe has applied them.

Judgment for the defendant.

Walton and others Aſſignees of Sutton againſt Shelley, M. T. 26 G. 3. Durnf. & Eaſt, I. V. 296. A perſon is not a competent witneſs to impeach a ſecurity which he has given, though he

Upon a motion to ſet aſide the verdict, and grant a new trial, *Buller*, *J.* before whom the cauſe was tried at *Guildhall*, at the ſittings after the laſt term, reported as follows;—That this was an action upon a bond given by the defendant to *Sutton*, to which there was a plea of *non eſt factum*, and another of the ſtatute of uſury. It was proved by one witneſs

is not interested in the event of the suit.

ness for the defendant, that the bond was given in consideration of delivering up two promissory notes made by Mrs. *Perry*, payable to *Birch* or order, the one indorsed by *Birch* and *Davenport Sedley*, the other by *Birch*, *Corbin*, and *Davenport Sedley*, to *Sutton*. *Davenport Sedley* was then called by the defendant, to prove that the consideration for the notes was usurious; but his evidence was objected to, on two grounds; 1st. That he was called to invalidate a security which he had given; and that an indorser of a note, independent of any question of interest, could not be permitted to prove a note void, which he himself had indorsed; 2dly. That he was *interested* in the question, which was meant to be put to him; for if the notes were given for an usurious consideration, he would never be liable to pay them: though by overturning the bond, they might be set up again. For these reasons the witness was rejected, as being incompetent.

This motion was made upon the ground, that *Davenport Sedley* was a competent witness, and ought to have been admitted to prove the fact of the usury.

Mingay, *Baldwin*, and *Manley* shewed cause, and argued upon the two questions which had been made; 1st. Whether the witness was not *interested* in the question? 2dly. Whether in any case a person shall be permitted to invalidate his own security?

Upon the first ground they contended, that the witness was certainly interested in the question which was put to him; for before the bond could be impeached, it was necessary to prove that the notes were usurious; but the witness being an indorser of those notes, could

not

not be admitted to give ſuch evidence. The anſwer given to this objection at the trial was, that *Sedley's* name had been ſtruck off. But if this had been an action on the notes themſelves, againſt the acceptor or drawer, and *Sedley* had been releaſed, his teſtimony could not have been received, becauſe he is immediately concerned in anſwering any queſtion upon the validity of them. It is upon this principle that many perſons are incapacitated from given evidence, who are entirely uninterested in the event of the *cauſe*, becauſe they are intereſted in the *queſtion* which is to be put to them. As in the caſe of commoners, who are not allowed to give evidence in an action concerning the right of common in another. So alſo, in the caſe of under-writers; they are never permitted to be called as witneſſes in an action upon the ſame policy which they have ſubſcribed, though they are not intereſted in that ſuit, as the verdict cannot be given in evidence in any other action. Neither can a co-obligor give evidence in an action upon the bond which he himſelf has executed, for the ſame reaſon.

2dly. The witneſs is called to invalidate his own ſecurity, ſince the conſideration of the bond, was the giving up of the notes, of which he was an indorſer; and therefore to deſtroy the one, he muſt impeach the others. The courts have frequently laid it down as an invariable maxim, that no man ſhall be ſuffered to invalidate his own inſtrument; if it were otherwiſe, the conſequences would be very prejudicial to trade. In the caſe of *Abrahams* and *Bunn*, (*a*) where the borrower of money (*a*) 4 Burr. 2251
was called to prove an uſurious contract, entered into by the defendant, who was a pawnbroker,

broker, though the competency of the witness was allowed, because the pledge was returned, [illegible] Lord *Mansfield* said — "Had the defendant "produced a security, or proved the pledge "to be remaining in his custody, it would "have been a different consideration, whether "the witness, who was the borrower of the "money, could be examined to contradict "this." In an action by the drawee of a bill of exchange against the drawer, the acceptor, who was insolvent, was not permitted to give evidence. *Mitchel* v. *Conaway*. (*a*)

(*a*) Vin. Abr. Evid. p. 14. [illegible]

In the case of *Winlaw* and *Daniel*, (*b*) which was an action of trover for three bills of exchange, Lord *Mansfield* merely said, that an indorser might be a witness to prove the property of the notes in *A.* or *B.* as he was equally responsible to either. In such cases, the testimony of the indorser does not go to invalidate his own security, and therefore he is admissible. But where such testimony goes in discharge of the note, he is not a competent witness. As in the case of *Whitienbury* and others, against *Jackson et uxor* executrix, (*c*) which was an action on a promissory note given by *Wheeler* the testator, in his life time, to one *John Collier*, and by him indorsed to the plaintiffs.

(*b*) Sitting after Hil. [illegible], at Westminster.

(*c*) Sittings after East. 1756, at Guildhall.

It appeared to have been an accommodation note, given by the testator *Collier*, who had bought goods of the plaintiffs, for which he was made debtor in their books to nearly the amount of the note. The defendant proposed calling *Collier*, to prove that the note had been satisfied by his having given two bills to the plaintiffs in discharge of it. The plaintiffs on the other hand contended, that the bills had been

been refused by them in discharge of the note, but that they had received them in payment of the book debt; and they objected to *Collier*'s testimony being received as indorser of the note. *Buller, J.* refused to admit him upon two grounds, 1st. That he was interested in proving the note paid, for he thereby got rid of it: and as to his being liable for the book debt, that was a different transaction. 2dly. That he was called to invalidate his own security; for though his evidence did not tend to impeach the validity of the note, yet it tended to take away the remedy upon it, by shewing it discharged.

It was not 'till after Lord Ch. J. *Lee*'s time, that the party who was interested in a note, could give evidence concerning it in a criminal prosecution for forgery, perjury, or usury, where the note was the foundation of it. 2 Stra. [illegible], 11 J. [illegible]

Bearcroft and *Bower, contra.* The tendency of this court, of late years, has rather been to confine, than to increase objections to the competency of witnesses. In order to judge of the admissibility of a witness, several circumstances are necessary to be understood. 1st. What the issue is between the parties. 2dly. What circumstances have already been proved in the cause. 3dly. What the witness is called to prove; and then it is to be considered, whether there is any substantial ground for the rejection of his testimony. The issue between the parties in this case was, whether the bond had been given by the defendant for an usurious consideration. It had been already proved by another witness in the cause, that the consideration for executing this bond, was the giving up of the two notes, which

which were at the trial avowedly in the hands of the defendant, having been restored to him at the time that the bond was taken. *Sedley*, the witness, was called to prove the consideration of these notes usurious, in order to invalidate the bond. He was objected to, as being an indorser, and thereby coming to set aside his own security. But when the peculiar circumstances of this case appear, the court will see that he could have no possible interest in setting aside the bond; for, if he were interested at all in giving his evidence, it was rather against proving the fact for which he was called; for so long as the bond subsisted, he was entirely discharged; therefore it was his interest to support it.

Then, if there is no objection to his evidence in point of interest, the only consideration is, whether he shall be permitted to invalidate his own security?

They admitted the propriety of the general rule, that no person ought ever to be permitted to invalidate any instrument, or cash-paper, to which he has contributed to give a currency, by affixing his name. But that rule has only been adopted in cases where the action has been brought, on such specific note, or bill, against the person liable. There the evidence of the indorser could not be received, because it tends to impeach his own security. But that principle does not apply here; for the notes of hand have actually been given up; they are not the subject of dispute in this action; and therefore it is no longer the interest of the public to prevent the indorser from telling the truth, as he himself is no longer liable upon them, and they have ceased to be in circulation. If, indeed, the notes

had

had remained as a collateral security, and had not been merged in the bond, the case would have been different. As the witness, therefore, was not *interested* in the *cause*, neither was he in the *question*: for the *question* was upon the validity of the bond, (to which he was not a party,) and not on the notes. If the question had been, whether these notes were the consideration of the bond, then the witness might have been interested; but that had been proved by another witness. In the case of *Clarke* against *Shee*, and another, (*a*) Lord *Mansfield* mentioned the case of *Bush* and *Rawlins*, which was an action of debt upon the 2 *Geo.* 2. *c.* 24. against bribery; where a person who had taken the bribery oath was held a competent witness, to prove that he himself had been bribed *.

(*a*) Cowp. 199

* Could the Jury give him credit? [illegible] of perjury, and liable to be convicted, upon an indictment properly framed.

So in some cases a man is permitted to impeach his own security, as by pleading usury upon the record.

Lord MANSFIELD, CH. J.

The old cases, upon the competency of witnesses, have gone upon very subtle grounds. But of late years, the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the *credit*, rather than to the *competency* of a witness. In this case, it seems to me that the witness had no interest in the present question, for either way he is discharged. If the bond is good, it puts an end to the notes; if bad, the same ground that vacates the bond, vacates the notes; therefore, in point of *interest*, I think there is no objection to his competency. But what strikes me, is the rule of law founded on

public policy, which I take to be this, that no party who has ſigned a paper or deed ſhall ever be permitted to give teſtimony to invalidate that inſtrument which he hath ſo ſigned. And there is a ſound reaſon for it; becauſe every man who is a party to an inſtrument gives a credit to it. It is of conſequence to mankind that no perſon ſhould hang out falſe colours to deceive them, by firſt affixing his ſignature to a paper, and afterwards giving teſtimony to invalidate it. It is emphatically right in the caſe of notes; for, in conſequence of different ſtatutes, two very hard caſes have ariſen. *Firſt*, with reſpect to a gaming note, which, though in the poſſeſſion of a *bona fide* purchaſer, without notice, is void. It is ſimilar in the caſe of uſury: A note given for an uſurious conſideration, though in the hands of a fair indorſee, is equally void. And therefore whenever a man ſigns theſe inſtruments, he is always underſtood to ſay, that, to his knowledge, there is no legal objection whatever to them. The civil law ſays, *nemo alligans ſuam turpitudinem eſt audiendus*. Now, apply this general maxim to the preſent caſe, with the diſtinction which has been taken. It has been argued at the bar, that this rule only holds where the action is brought upon the notes themſelves, and therefore not relevant to this caſe. But I take the caſes to be exactly the ſame. For the queſtion on the validity of the bond involves in it the validity of the notes. The obligee of this bond truſted to the notes; he gave them up as a conſideration for the bond; he truſted to the name of the indorſer, and that *he* knew of no objection to the notes, and yet this ſame perſon was afterwards called to

 ſay,

ſay, that they were given for an uſurious and illegal conſideration; therefore, on that ground, I am of opinion that he was an incompetent witneſs.

Willes. J.—As to the incompetency of *Sedley's* evidence on the ground of *intereſt*, I am clear that he had none, or rather, that he came to give evidence contrary to his intereſt; becauſe by deſtroying the bond he ſets up the notes. But the general rule is, that no man ſhall be permitted to invalidate, by his own teſtimony, an inſtrument to which he is a party; and there has been no caſe cited in which this rule has been impeached. There has indeed been an inſtance, where a man was ſuffered to *explain his own deed.*

That was a caſe before me at the laſt aſſizes at *Lancaſter*: Two brothers joined in an aſſignment of a ſhip: and the queſtion was, whether one of them had any intereſt in the veſſel at the time of the aſſignment. He was called to prove that he had none. His evidence was objected to, on the ground that he ought not to be permitted to contradict his own deed; but I was of opinion, that he was a competent witneſs, becauſe he came to ſwear againſt his own intereſt, that he had no property whatever in the veſſel: and he explained it in this manner; that the perſon, to whom the aſſignment was made, thought that this witneſs had an intereſt in the veſſel, and would not accept the aſſignment unleſs he was joined in it; and the court of Common Pleas refuſed an application, laſt term, to ſet aſide the verdict, and agreed with my direction.

It is better in general, that objections of this kind ſhould go to the *credit* than to the *competency* of the witneſs. But the preſent

question falls within the general rule, that no man shall be permitted to allege his own turpitude, in having given credit to a false and illegal security.

Ashhurst, J. The general rule is, that where a man is not interested in the *event*, he shall be a competent witness, though he may have a bias upon his mind with regard to the subject matter. As, if a person bring two several actions against two defendants for the same battery, in the action against one, the other may be a witness, because he is not interested in the *event*. Any objections to such testimony should go to the *credit*, rather than to the *competency*, of the witness: therefore, if the present objection had rested solely on the question of interest, I should have been of opinion that *Sedley* was a good witness. But he is inadmissible on another ground, that no man shall be permitted to invalidate his own act; and here he has been a party to the fraud, by affixing his name to the notes, and giving them a sanction; and having done that, he shall not be admitted upon any account to say that these notes were void,.

Buller, J. Two grounds of objection have been taken. The first steers clear of interest in the event of the cause, and I have always understood it to be a settled principle, that no man shall be permitted to invalidate his own act. A distinction has been attempted to be made between the present case, and an action on the notes themselves, but there is no foundation for such a distinction: for, if an action be brought on a note against the drawer, an indorser cannot be called as a witness for him, though he is not interested in

that cause; and if a verdict be given against the drawer, and satisfaction obtained from him, the indorser is discharged. In that case it is his interest to charge the drawer, therefore there is no difference between an action upon the notes against the drawer, and the present action upon the bond. But the ground of objection has always been, that no man shall invalidate his own security.

As to the question of *interest*, it is much to be lamented, that there is such confusion in the cases. I have always been of opinion, that the best rule to go by was, to consider whether the witness was to derive any advantage from the event of the cause: but many cases tend strongly to contradict that idea. The material thing to be considered is, whether there is any distinction between the interest which the witness may have in *the issue of the cause*, and the *question* to be put to him. I am strongly inclined to think, that the most solid ground is to confine the objection to an interest in the event of the cause: but in doing that, we must overturn many cases. As in the case of commoners, if the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends upon a custom, the record in that action would be evidence in a subsequent action, brought by that very witness, to try the same right; therefore, there is a good reason for not receiving his testimony in such case. But the same reason does not hold, where common is claimed by prescription in right of a particular estate, because it does not follow, that if *A.* has a prescriptive right of common belonging to his estate,

that *B.* who has another estate in the same manor, must have the same right; neither would the judgment for *A.* be evidence for *B.*: and yet there are cases, which lay it down as a general rule, that one commoner is in no case a witness for another.

Then in the case of policies of insurance, it has been held, that one under-writer cannot be a witness for another. *Ridout* and *Johnson*, *East.* 11 *Ann.* And the *East-India Company* and *Gosling*, *Mich.* 16 *Geo.* 2. *cor.*
(a) Bull. Nis. Pr. 283. *Lee*, *Ch. J.* (*a*).

In these cases, if the evidence offered tends to invalidate and destroy the instrument itself, that may be a reason for rejecting such testimony; but where such evidence is offered for any other purpose, there does not seem to be any good reason why it should not be received, for that verdict could not be given in evidence in another action upon the same policy against the witness or another under-writer. The cases on this subject which have staggered me most, are two later ones in this court, by the names of *French* v. *Backhouse*,
(b) 5 Burr. 2727. and *French* v. *Foulston*, *E.* 11. *G.* 3. (*b*). Those were two distinct actions of covenant, brought against two part-owners of a ship by the husband of her, who had been appointed to that office by a deed executed by all the joint-owners, by which deed they empowered him generally to advance or lend money, &c. The husband of the ship insured for all the owners, and brought separate actions against two of them. They were each of them charged for the amount of the whole sum paid. It was there agreed, that the direction to insure, given by one part-owner, did not bind the rest. And in the first action against

Backhouse,

Backhouse, Mr. *Dunning* offered to call the other part-owner, and insisted that he was a competent witness, because he was not interested in the event of that suit; for that each of the two causes was to stand on its own evidence: but he was rejected by Lord *Mansfield* as an incompetent witness, and the court, upon motion for a new trial, were afterwards of that opinion. There the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the second defendant, who was offered as the witness, could not have been charged with any part of the damages recovered in the first action.

Therefore, if there is any difference between an *interest* in the *question*, and an *interest* in the *event* of the cause, and an *interest* in the *question* disables a witness, I think these cases prove that this witness was incompetent; for the question put to him was upon the validity of the notes. How, or in what manner such evidence was to bear upon the case, was material for further consideration, and further evidence in the progress of it; and the witness could not tell how the cause would turn out, or what effect his testimony might produce.

Rule discharged.

Before we close this sub-division, we shall beg leave to make another * abstract from the able argument of Lord *Camden* in *Doc. Dm. Hindson & Ux. & al.* v. *Kersey*, wherein he held that parishioners benefited by a bequest to the poor, could not be witnesses to prove the will.

* We have given several abstracts already, v. ante.

He says, (p. 49 & seq.) " As to the objection that the interest is minute, and

that a ſmall intereſt, as in *Townſend's* caſe, ought not to diſqualify witneſſes.

" I do conceive that however that point might have been litigated formerly, yet now the law is clearly ſettled, and the witneſs muſt be rejected, if he has any intereſt, *be it ever ſo ſmall.*

" The point was diſputed for about twenty years, in the caſe of toll or cuſtom claimed by the city of *London* upon importation, called by the name of water bailage.

" The queſtion was, whether freemen might be witneſſes? Nothing can be more minute than ſuch an intereſt; and yet after many opinions *pro* and *con.* it was finally ſettled that they were not witneſſes.

" Any perſon that has a mind to trace the hiſtory of this queſtion, may find it in 2 *Keb.* Rep. 295. *pl.* 84. 2 *Show.* Rep. 47. *pl.* 33. *Id.* 146. *pl.* 127. 2 *Lev.* 231. *Ventr.* 351.

" This laſt caſe, and it is the laſt I can find upon the ſubject, 32 *Car.* 2. is differently reported in the two books; for one (*a*) ſtates that three (*b*) judges allowed the witneſſes, and (*c*) one diſſented, upon which the council for the defendants tendered a bill of exceptions, but the plaintiff gave it up, and called other witneſſes.

(*a*) Ventr. 351.
(*b*) viz. Scroggs Ch. J. Dolben and Raymond Js. Vent. 351.
(*c*) Sir Thomas Jones.

" The other book (*d*) ſays, that the freemen were denied to be witneſſes, and that the plaintiff tendered the bill.

(*d*) 2 Show. Rep. 46, 146. pl. 127.

" I cannot reconcile the books, but both agree the witneſſes were not examined, and the verdict went for defendant.

" What became of the bill of exceptions does not appear, I ſhould gueſs it was argued and ſettled ſolemnly, that the freemen could not

not be witnesses, because it is so said by a Lord Keeper and a Lord Chancellor in *Vernon*.

"1st. Lord Keeper *North* in 1684, two years after this trial, said, 'He thought it very hard in the case of the *water-bailage* of *London*, that no one freeman of the city, though it was not sixpence concern to him, could be admitted as a (*a*) witness.'

(*a*) Vern. 254. pl. 246.

"In 1694, Lord Chancellor *Somers* said, 'In suit touching the loss and misapplication of a sum of money given for the benefit of the parishioners, none of the inhabitants ought to be witnesses, for in a case where a party is concerned in interest, though never so small, the objection has always prevailed; and it was so resolved upon great debate in the case of the City of London, concerning the (*b*) *water-bailiff*.'

(*b*) Id. 317. pl. 318.

"Upon issue joined upon a prescription for a toll, the defendants produced a witness; the plaintiff objected that he was a freeman, and so interested; upon which the defendants produce a judgment in the mayor's court, where upon a *scire facias* awarded, and two *nihils* returned, they had given judgment of his disfranchisement: but upon inquiry, the man said he never was summoned, and knew nothing of his disfranchisement; therefore, the proceeding being irregular, *Holt* would not admit the man to be an evidence, because the judgment in the mayor's court may be (*c*) avoided.

(*c*) 11 Mod. 225. pl. 20.

"The statute of 3 & 4 *W.* & *M.* *c.* 11. *sect.* 13. is material for this purpose, for by that act of parliament, 'In all actions brought in the courts of *Westminster*, or at the assizes, for

for any money miſpent, or taken by church-wardens or overſeers of the poor, the evidence of the pariſhioners, other than of ſuch as receive alms, or any penſion out of ſuch collections, or public monies, ſhall be admitted.'

" So again by ſtat. 1 *An. St.* 1. *c.* 18. *ſect.* 13. ' In all informations or indictments, the evidence of the inhabitants of the town or county in which decayed bridges or highways lie, ſhall be admitted.'

" Which acts ſhew that the rule to reject the witneſſes for minute intereſt, could not be broke in upon by leſs authority than an act of parliament.

(a) 12 Vin. 18. pl. 19. " There is a caſe in (*a*) *Viner*, where it is ſaid, that in information by attorney general, at the relation, *&c.* on behalf of themſelves and all inhabitants of the town of *Warwick*, *&c.* relating to charities, *&c.* a perſon, an inhabitant, receiving alms, is no witneſs; for every inhabitant either pays, or is under a poſſibility of paying to the church, poor, *&c.* though he pay nothing at preſent.

" If the rule be ſo, it muſt prevail as an objection to all witneſſes without exception, and there can be no difference between witneſſes to a will, and any other; I ſay this, becauſe I ſee a practice has prevailed to admit will-witneſſes where the legacy was

'In the argument of the *water-bailage* caſe, it is ſaid, that ' a ſmall legatee has been ſworn to prove a (*a*) will,' and that it had been (*b*) uſual.

(a) Ventr. 351.
(b) Sir Bartholomew Shower (who reports the ſame caſe by the name of The King againſt Carpenter) his words are, " Hath ſometimes been allowed a witneſs to prove a will." Show. Rep. 47. pl. 33.

" And

" And Lord *North* is made to ſay, ' it was uſual where a man was a legatee, if it was an inconſiderable legacy, as five ſhillings (or five pounds to a man of quality,) that he ſhould nevertheleſs be a witneſs to prove the (*c*) will. (*c*) Vern. 254.

" It is plain there had been ſuch a practice, and I take it to be upon that ground that the pariſhioner was allowed to be a witneſs in *Townſend*'s caſe; but that practice ceaſed, I believe upon the Statute of Frauds.

" But I take it moſt clearly, that this notion is now exploded, and therefore if it ſhall be once admitted, that the pariſhioner in *Townſend*'s caſe, had an intereſt under the will, the caſe neither is nor can be law, 'till it can be proved that a legatee of a ſmall ſum may at this day be a witneſs.

" True it is, that the intereſt of the witneſſes in ſome caſes, is drawn ſo fine, that it is ſcarce perceptible; and yet that glimmering, that *ſcintilla*, ſhall be as powerful to exclude the witneſs, as the moſt ſubſtantial profit, and I have always underſtood that (*d*) caſe to be good law, where the court ſet aſide the witneſs, becauſe he thought himſelf bound, in honor to pay the coſts of the ſuit. (*d.*) Stra. 1 9.

" The true ground whereof is this, which is fit to be attended to in every part of this branch of the argument, that as no poſitive law is able to define the quantity of intereſt that ſhall have no influence upon the minds of men, it is better to leave the rule inflexible, than permit it to be bent by the diſcretion of the judge.

" THE DISCRETION OF A JUDGE IS THE LAW OF TYRANTS; IT IS ALWAYS UNKNOWN;

IT

IT IS DIFFERENT IN DIFFERENT MEN; IT IS CASUAL, AND DEPENDS UPON CONSTITUTION, TEMPER, AND PASSION. IN THE BEST IT IS OFTEN TIMES CAPRICE; IN THE WORST IT IS EVERY VICE, FOLLY, AND PASSION TO WHICH HUMAN NATURE IS LIABLE."

So far Lord *Camden*.

It may not be improper, to add, a citation of Mr. *J. Wilmot*'s from 5 *Co.* 100. *a Rooke*'s Case.

" DISCRETION is a science and understanding of distinguishing and discerning between falsehood and truth, *&c. &c.* and *not* to do according to arbitrary will and private affection*."

Dei Delitti e Delle Pene. Ed. Harlem, 1780.

* Those who have not read *Beccaria*'s famous tract, may not be displeased to see what that great man says upon the *Construction of Laws*. *Int. al.* He saith, " In every crime the judge ought to make a perfect syllogism: the major ought to be the general law; the minor, the action conformable or not, to the law; the consequence, liberty, or punishment: when the judge is compelled by the laws, or chooses to make any other or more syllogisms, it will open the gate to uncertainty.

" There is not any thing so dangerous as the common axiom, that it is necessary to consult the *spirit* of the law. This is breaking down the dam to the torrent of opinions. This truth, which seems a paradox to vulgar minds, more struck with a small present disorder, than with the fatal, but remote consequences which arise from a false principle rooted in a nation, seems to me demonstrable. Our knowledge and all our ideas have a reciprocal connection; the more complicated they are, the more numerous are the ways of arriving at or deviating from it. Each man hath his own point of view, each man at different times hath a different one. The spirit of the laws therefore will be the result of the good or bad logic of the judge, of an good or bad digestion; it will depend upon the violence

violence of his paſſions, upon the weakneſs of him who ſuffers, upon the relation of the judge to the *party* offended, and upon all thoſe minute powers which change the appearances of every object, in the fluctuating mind of man."

I ſhould for the author's ſake, obſerve, that fearful of obſcuring the meaning of the above paſſages, I have given, as nearly as I could, almoſt a literal tranſlation.

[3.] *Persons wanting discernment.*

THOSE persons who are excluded from giving testimony for want of skill and discernment, are *ideots*, *madmen*, and *children*.

Co. L. 6. b. Every witness must be *credible*, and therefore, a man of *non-sane* memory, shall not be allowed as a witness. As an ideot, a lunatic, during his lunacy. But he may be a witness *in lucidis disintervallis*. 5 Com. Dig. 515.

Co. L. 6. b. So one within age of discretion. As, an infant who does not know the nature of an oath.

B. N. P. 293. In regard to children, there does not seem to be any precise time fixed, wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the court. However, it seems to be settled, that a child under the age of ten*, shall in no case be admitted; but after that age, if the child appear to have any notion of the obligation of an oath, after there hath been a foundation laid by other witnesses to induce a suspicion, the child shall be admitted to prove the fact. Doubtless the court will more readily admit such a child, in the case of a personal injury, (such as rape) than on a question between other parties; and perhaps in such case, would even admit the infant to be examined without oath;

* Qu. de hoc. Steward's case, Old Bailey, 1704. Stra. 700. Vide L. Hawk. 2 V. 612. s. 27. (N.) contr.

1 H. H. P. C. 634. Dy. 304.

oath*; for certainly there is much more reason that the court should hear the relation of the child, than receive it at second-hand from those who heard it say so. In cases of foul facts done in secret, where the child is the party injured, the rejecting its evidence intirely, is, in some measure, denying the infant the protection of the law; yet the levity of children, and their want of experience, are, undoubtedly, circumstances which go greatly to their credit.

* Qu. if the prisoner has not a right to insist upon an oath being administered?

The judges will however, determine according to the discretion of the infant. *Vide post Evidence in Criminal Cases.*

[4.] *Counsel, Attornies, and Solicitors, who are Intrusted by their Clients.*

B. N. P. 284. Lindsey and Talbot, T. 12 Geo. 1. Oct. Stra. 140.

THEY are in such a predicament, that they ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose, for it is the privilege of the client, and not of the counsel or attorney, *&c.* It is contrary to the policy of the law to permit any person to betray a secret with which the *law* hath intrusted him; and it is mistaking it for the privilege of the witness, that hath sometimes led judges into the suffering such persons to be examined. But to this there are some exceptions: *First*, as to what they knew before the retainer; for as to such matters they are clearly in the same situation as any other person: and, was it not so, a party might conceal evidence, by retaining a material witness, if of the profession of the law. *Secondly*, to a fact of his own knowledge, and of which he might have had knowledge, without being counsel, or attorney in the cause. As suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So if the question were about a razure in a deed or will, he might be examined to the question whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head: so if an attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury,

B. N. P. 284. Ld. Say and Seale's case. Mic. 10 An. per Sr. O. Bridgman, with advice of all the judges.

Rex v. Watkinson, M. 13. G. 2. Stra. 1122. Cont.

perjury, he would be a witneſs to prove the fact of taking the oath, ſor it is a fact in his own knowledge, and no matter of ſecrecy committed to him by his client.

Qu. if proving the defendant's hand writing to the anſwer, would not be ſufficient?

A *ſcire facias* was brought by the king to avoid a patent, and exception was taken to the witneſs, becauſe he was deputy to the perſons that would avoid it, but the exception was diſallowed, becauſe the *ſcire facias* was in the King's name, and therefore it could not be preſumed that the intereſt was in another, which would deſtroy the very being of the *ſcire facias*; and the proof of that ought to come on the defendant's ſide. 1 Mod. 21.

Vide farther as to *Competency*, *Eſſay* II. IV. *Turner* and others *v. Pearte*.

[C.] Of Evidence upon various Issues.

Previous Observations.

G. L. E. 147. BEFORE we proceed to specific issues, we shall say something upon *probability*, and upon whom the *proof* of the *issue* lies.

(*a.*) *Of Probability*, and upon whom *Proof* of the *Issue* lies.

Probability arises from the agreement of any thing with a man's own thoughts and observations, from the testimony of others who have seen, and heard of the fact in question.

And here it is first to be considered, that in all courts of justice the *affirmative* ought to be proved, as it is sufficient barely to deny what is affirmed, until the contrary be proved, for words are but the expressions of facts; and therefore when nothing is said to be done, nothing can be said to be proved; and this is a rule both in the common and civil law. The civil law says, *Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla est probatio.*

Dig. Lib. 2. Tit. Probat.

But in a case where the affirmative is proved, the other side may contest it with opposite proofs, and this is not properly the proof of a negative, but the proof of a proposition totally inconsistent with what is affirmed; and therefore, where the general issue is in the negative, the plaintiff must always begin with his proofs, because the defendant cannot prove the negative, and the charge beginning by the

the plaintiff, the defendant must take it out of his evidence; as if he be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, the defendant can only prove a proposition inconsistent with the charge, as that he was at another place at the time, when the fact [is] supposed to have been committed, or the like.

But where the law supposes the matter contained in the issue, there the opposite party must be put to the proof of it by a negative; as in the issue *ne unques accouple en loyal* matrimony, the law will suppose the affirmative without proof, because the law will not easily suppose any person to be criminal, and therefore in this case the defendant must begin with the negative.

Qu. If the other party should not first give some proof, to induce a presumption that there was a marriage?

In a writ of *right* the evidence must begin from the tenant, if the *mise* is thus joined, *Et defend. se pon in magn. assis. dom. Reg. et petit recognitionem fieri utrum ipse majus jus habeat tenendi tenementa cu'. pertinent' sibi et heredibus suis ut tenens inde, sicut illa tenet: an præd' querens habendi eadem tenementa cum pertinen' ut illa superius pet.* so that in this case the defendant's issue is in the affirmative, and therefore the proof must begin from him. 2 Leon. 162. Hughes's Ab. 86. G.[illegible]b. 23. Co. Ent. 182.

The witness produced must first be examined on the part of the producer, and then the other side may examine him; and this is a regulation that naturally follows the true order of things, for it is proper first to enquire what a witness can prove, before you are to examine how much more he knows, than what he hath disclosed.

 The

The analogy of this method is alſo obſerved in equity; for if the plaintiff takes out a commiſſion he ſhall have the carriage of it; but if the plaintiff will not take out a commiſſion the next term after iſſue joined, then the defendant may take it out, and the carriage belongs to him, for he that carries the commiſſion is firſt to produce and examine his witneſſes, and he that is firſt to produce the witneſſes is to have the carriage of the commiſſion. It firſt belongs to the plaintiff to prove the allegations of his bill, and if he fails, the defendant may prove his anſwer.

(*b*.) *Of* one *Witneſs*.

THE firſt and loweſt proof is the oath of one witneſs only, and there is that ſanction and reverence due to an oath, that the teſtimony of one witneſs naturally obtains credit, unleſs there be ſome appearance of probability to the contrary. Witneſs.

Now that which ſets aſide his credit, and overthrows his teſtimony, is in the incredibility of the fact, and the repugnancy of his evidence; for if the fact be contrary to all manner of experience and obſervation, it is too much to receive it upon the oath of one witneſs; or if what he ſays be contradictory, that renders him unworthy of all credit, for things totally oppoſite, cannot gain belief from the atteſtation of any man.

When one witneſs atteſts a variety of circumſtances, and there is no other proof of any one of thoſe circumſtances, falling in with what he atteſts, this may render ſuch a witneſs (ſtanding alone, without any aſſiſtant proof,) very much ſuſpected; and there muſt be great confidence in the integrity and veracity of the man, to believe many circumſtances on one man's ſingle teſtimony, where, if it were true, there might be a multitude of concurrent proofs, to ſtrengthen and confirm the evidence.

Another thing may render his teſtimony doubtful, *viz.* his not giving the reaſons and cauſes of his knowledge; for if a man can give the reaſons and cauſes of his knowledge, and doth not, he is forſworn; becauſe he is

 bound

bound to tell the *whole* truth, and by conſequence he is not worthy of credit; for that a man ſhould know any thing, and not tell by what means he knows it, is incredible.

The ſame may be ſaid as to perſons who take upon them to remember things long ſince tranſacted; eſpecially, if the matter be frivolous; they ought to tell the reaſons why they remember, otherwiſe their memory is little to be credited; for it is more reaſonable to ſuppoſe they are raſh perſons, who take upon them to ſwear what they do not perfectly remember, than that they are really under the awe of, or pay any regard to, an oath, for then they would be able to tell, and would aſſign the reaſon and certain marks of their remembrance.

Other things may render a witneſs ſuſpected, as if he who was a party to the crime, ſwears for his own ſafety or indemnity, or be a relation, or friend to the party, or the like; or be of a profligate or wicked temper or diſpoſition; and the weight of the probability lies thus; if you think the bias is ſo ſtrong upon him, as would incline a man of his diſpoſition, figure and rank in the world to falſify, you are to diſbelieve him; but if you think him a man of that credit and veracity, that, notwithſtanding the bias upon him, he would have a due regard for truth, and conſider himſelf as under the force and obligation of an oath, he is to be believed.

Hearſay. Vide Introduction.

The atteſtation of the witneſs muſt be to what he *knows*, and not to that only which he hath *heard*.

2 Hawk. P. C. 431. Skinn. 402. 1 Mod. 283.

Although hearſay be not allowed as direct evidence, yet it may be in corroboration of a witneſs's teſtimony, to ſhew that he affirmed the

the ſame thing before, on other occaſions, and that the witneſs is ſtill conſiſtent with himſelf; for ſuch evidence is only in ſupport of the witneſs, who gives his teſtimony upon oath.

Another thing that derogates from the credit of a witneſs is, if formerly, on a criminal trial, he, upon oath, affirmed directly contrary to what he now aſſerts; then if the matter be civil, you may give in evidence the criminal proceedings, and depoſe to what he gave evidence of at the former trial; and this takes from the witneſs all credibility, inaſmuch as contraries cannot be true.

(c.) *Of* two *Witnesses.*

G. L. E. 153.

THE second degree of credibility arises from the oaths of two witnesses, and this is one step higher than the credibility that arises from the oath of one witness only; for in such case, if they agree in every circumstance, there must be two perjured, or what the witnesses alledge and depose must be true: but if, upon their examination, they disagree in circumstances*, then they fail in their credit, because their contradictions cannot be true.

* This must mean material, or striking circumstances.

Yet if the matters they attest, were transacted long ago, it is capable of a fair answer, for it may be supposed that the little circumstances of things might be forgotten, and if in every minute and particular circumstance they both agree and concur in evidence, it seems more like a story concerted beforehand.

There are some cases in the law, where the full evidence of two witnesses is absolutely necessary; and that is,

2 Hawk. P. C. 256.

First, where the trial is by witnesses only, as in the case of a *summons* in a *real action*, for one man's affirming, is but equal to another's denying; and where there is no jury to discern of the credibility of witnesses, there can be no distinction made, in the credibility of the evidence, as the court doth not determine of the preference in credibility of one man to another, for that must be left to the determination of the neighbourhood; therefore, where a *summons* is not made and proved by two witnesses,

witnesses, the defendant may wage his law of non-summons.

Secondly. The *second* case is in *chancery*, and that is, where there is but one witness contradicting the answer; for there the credibility is equal, unless it appears from the nature and face of the fact, that the answer is not to be believed, and the course of the court in such case is, to direct a trial at law, to ascertain the credibility of that witness by a jury, which is the common standard whereby the credit of every *Englishman* is to stand and fall, in all events. 1 Vern. 161. 2 Vern. 283. 3 Chan. Cas. 123.

Thirdly. The *third* case where the law requires two witnesses, is in the case of *high-treason*, and this is not so much from the natural justice of the rule, that every man's allegiance is supposed 'till the contrary is proved, and that therefore, the negative of the prisoner is equal to the affirmative of one witness, and the treason ought to be proved upon him by two witnesses; for then the same would be good in cases of felony, where every man's honesty is presumed 'till the contrary is proved; and yet there, it is sufficient to prove the contrary by one witness; but the law has appointed two witnesses in this case, because a court-faction might in many cases cut off their enemies on such charges without sufficient proof, and now by statute law two witnesses are required to every overt act of treason. G. L. E. 155. 2 Hawk. P. C. 256, 428. 7 & 8 W. 3. c. 3.

Two witnesses were required in the case of *Heresy*, because this was tried by the canon law, and they followed the rule of the *Mosaic* law, that required two witnesses; besides, *heresy* was formerly reckoned treason, and therefore the law did in such cases require two witnesses. Ray. 408.

To this may be added the caſe of perjury, where, on a proſecution for ſuch an offence, two witneſſes are required, becauſe the oath of the defendant, is equivalent to the oath of one witneſs.

Hal. H. P. C. 292.

There are other caſes where the trial is by witneſſes, and yet one witneſs ſuffices, and that is on the 18 *Eliz.* where the mother of a baſtard child is allowed evidence to prove the reputed father; and this is for neceſſity, becauſe otherwiſe ſuch ſecret lewdneſs would go totally unpuniſhed; but then if a woman charges two perſons, ſhe loſes her credibility, ſo that ſhe cannot charge either of them; but if ſhe keeps conſtantly to the charge of one only, it is a ſufficient proof, the ſtatute having ſet aſide the common law in that particular.

I. Of

I. Of the First Sort of General Issues.

[1.] *Of non est factum.*

WE now come to issues in particular actions, and first the issue of *non est factum*. We have already considered what is the legal consequence of *interlineation*, *razure*, and the *breaking off seals* from deeds: and now we are to consider what other evidence is proper upon this issue. G. L. E. 161.

If an obligation is delivered to the use of another, and he disagree to it, by this disagreement the obligation hath not any force, and he can never agree to it afterwards, therefore this is not a deed, and the *disagreement* may be given in evidence upon *non est factum*. 5 Co. 119. b. Cro El. 54. 1 And. 4. Dy. 167. 2 Leon, 110, 111. Bendl. 75 contra.

If a man seals an obligation, and commands another to keep it 'till certain conditions are performed, and the bond is delivered to the obligee, before they are performed, this cannot be the bond of the person sealing it, 'till those conditions are performed, and therefore the special matter may be given in evidence, to prove *non est factum*. 2 Rol. Ab. 683. pl. 8. V. 6 Mod. 2[illegible]. Savil, 71.

Sed Query, If it should not be specially pleaded?

Upon *non est factum*, if the witnesses prove delivery at another place than where it bears date, it doth not warrant the issue; for this is a testimony contrary to the plain words of the deed, and therefore no proof of the deed in question. *Quære tamen*, for the *place* where the deed was made is not a material part of the deed. 2 Rol. Ab. 677. pl. 24. Cates, 2 E. 6, 7. 31 H. 6. 2 Co. 4, 5. Goddard's Case.

There

Suppose a bond appear upon the face of it, to be made at York, *and the plaintiff chooses to declare in* Middlesex, *to avoid all doubt, he may alledge the bond to be made at* York, *to wit, at* Westminster, *in the county of* Middlesex.

'There are but *three* things of the essence and substance of a deed, that is to say, *writing*, in paper or parchment; *sealing*; and *delivery*; and if it have these three, it is sufficient.

5 Co. 119. Cro. Ja. 152. Dy. 310. 2 Rol. Ab. 677. pl. 10.

In debt against two, and *non est factum*, pleaded, if it is proved to be the deed of one of them, and not of the other, the issue is maintained; for a joint action charges each with the whole debt, and when the issue is found that it is the deed of one, it amounts to the total cause of complaint alledged in the declaration against that person, and consequently the plaintiff ought to recover against him, since he is proved to be his debtor. *Qu. If this must not be where one defendant makes default, and the other pleads; or where the defendants plead separately? Suppose both the defendants join in pleading that it is not their deed?*

5 H. 7. 38. 2 Co. 9. Plowd. 66.

Upon *non est factum*, you may give, not lettered, in evidence; for when the person who delivers the deed is unlearned, and the deed is read and expounded to him in another sense than that which the deed really contains, the party does not agree to the written deed: it is not the expression of his mind, nor to be accounted his deed.

5 H. 7, 8. Bract. 3. 2 Rol. Ab. 6,7. pl. 25.

It has been a question whether *riens passa per le fait*, may be given in evidence upon *non est factum*; for on the one side it may be said, that on *non est factum*, the operation

of

of the deed is not in debate, but whether the party ſigned, ſealed, and delivered the contract, alledged in the declaration; ſo that if the eſſential part of that kind of contract be proved, ſome take it to be a proof of the iſſue; others have ſaid that where a deed is of no effect, to paſs any right, it is utterly void and of no effect, as if a man accepts a leaſe of his own lands by deed poll; and where a contract is void and of no effect, it is conſidered as no contract.

If a man be bound to *Randolph*, and the plaintiff declares of an obligation to *Ralph*, upon *non eſt factum* pleaded, it cannot be found to be an obligation to *Randolph*; for *Randolph* and *Ralph* are different Chriſtian names, and cannot denote the ſame perſons; ſo it is with reſpect to *Edward* and *Edmond*.

G. L. E. 163. Vide poſt, Eſſay II. v. Maby v. Shepherd. et vide poſt, this head. II. v.

If a deed be enrolled, you ſhall not plead *non eſt factum*, for by the acknowledgment of the party it appears to be his deed; as there is ſuch credit given to tranſactions in a court of juſtice, that the party ſhall never ſay he did not acknowledge it; ſo although this deed be not a record (that is, no act of the court, in the deciſion of right and wrong) yet it is in court, and ſo far to be credited, that the party ſhall never deny the being of ſuch a deed; but he may avoid the operation of it, by pleading *riens paſſa per le fait*.

9 H. 6. 60.

If a man be blind, and the deed miſread to him, he may plead *non eſt factum*, and ſuch evidence will maintain the iſſue, for then it is not his contract.

Style, 78. 2 Co. 9

A ſtranger to a deed ſhall not plead a ſpecial *non eſt factum*, as that the ſeal is ſevered from the deed, and *iſſint*, &c. but he

1 Rol. Rep. 128. 20 Ed. 4. 1. a.

he ought to plead *riens passa per le fait*, for a man ought to try the validity of a stranger's deeds no farther than they regard his own interest, and therefore he cannot deny the *being* of such a deed, but only the *operation* of it as to himself.

Style. 414. 2 Co. 4. Cro. Jac. 136. The plaintiff declares of a bond *dated* the 24th, upon *non est factum*; the jury find a bond dated the 24th, and delivered the 27th; this is a finding of the deed in the declaration.

5 Co. 119. 1 Ld.Raym. 315. Plowd. 668. Moor. 43. Upon *non est factum* a man cannot give *infancy* in evidence, but he must plead it, and conclude to the court with an *hoc paratus est verificare*, for the infant is in law reputed to have a contracting power for his own benefit, and to bind all the personal estate which is his own, and he hath power to avoid his agreements or not, therefore, this cannot be said to be a void agreement; consequently the issue of *non est factum*, is not proved by the evidence of infancy, since the issue denies any agreement at all.

4 H. 4. 30. But coverture may be given in evidence on *non est factum*, for the wife hath not any will of her own, but is entirely subject to the power of the husband; he is to make all agreements that bind his personal estate; and therefore, at the time of the making, it was no deed.

5 Co. 119. Plowd. 60. A man cannot give *duress* in evidence on *non est factum*, for the only point in issue and the controversy on *non est factum* is, whether the deed declared on be the act of the party; so that when the act is proved to be done, the whole matter denied by the defendant on the general issue, is proved to the jury: but if there be any other circumstances to destroy

that

that act, and avoid its binding force, that must be shewn to the court, that the court, and not the jury, may judge whether they are sufficient to avoid the deed.

Where an act of parliament declares a bond to be void, as sheriffs bonds, against the stat. of 23 *H.* 6. * and usurious bonds against the stat. of 12 *Ann.* yet this matter cannot be given in evidence on *non est factum*, but must be specially pleaded, and shewn to the court to judge of; for where a statute declares a solemn act to be void, it is not to be construed *ipso facto* void, but to be void upon its appearing to the court to be within the circumstances mentioned in the statute, for it were preposterous that the statute should be referred to the jury, that are not judges of the law.

5 Co. 119.

St. 2. c. 16.

* V. infra, Hob. 166.

3 Co. 59.

Qu. If it is declared ipso facto void to all intents and purposes?

As to the *Stat.* of 23 *H.* 6.* *c.* 9. concerning sheriffs bonds, whatever might have been the law before the *Stat.* 4 *Ann. c.* 16. (§ 20.) which makes them assignable, the law is now settled, that as the condition of the bond must appear on the face of the record, if it be repugnant, or contrary to the act of *H.* 6. judgment may be arrested after verdict, though the defendant plead only *non est factum*.

Samuel assignee v. Evans. B. R. T. 28 G. 3.

If the deed be only voidable, the general rule is, that you must conclude to the court with judgment *si actio*, because the court may judge whether you have offered such matter as will amount to the avoiding of the deed, and the law is the same whether voidable at common law, or void by act of parliament.

1 H. 7. 15.

Moor. 43.

Where the controversy relates to the *signing*, *sealing*, and *delivery* of the deed by the defendant, he pleads *non est factum* generally, but

1 H. 7. 15.

5 Co. 119.

but anciently, where the deed was ſigned, ſealed, and delivered, yet was originally void
14 H. 4. 30. by matter *dehors*, as by reaſon of *coverture*, or becauſe the party had no right in the thing transferred by the deed, or became void afterwards by razure, interlineation, or addition, there, the defendant muſt have pleaded the matter ſpecially, and concluded ſo *non eſt factum*, and this was, that the plaintiff might be appriſed of the point of defence; for ſince there are ſo many various ways to make the deed null and void, if all of them might be given in evidence upon *non eſt factum* generally, it was thought that the plaintiff could never come prepared to falſify the evidence of the defendant, and ſo might be liable to be ſurpriſed when he had right, and therefore it was held that notice ought to be given of ſuch foreign matters as theſe, if they were to be given in evidence.

C. L. E. 167. Another reaſon why this ſpecial concluſion, and ſo *non eſt factum*, was antiently referred to the court, was, becauſe it generally contained matter of law, which if it had ariſen upon proof of the fact, ought to have been referred back to the court, by demurrer to evidence, or ſpecial verdict, and therefore it was reaſonable, that the doubt of law ſhould be offered to the court originally; but at this day the law is otherwiſe.

3 Keb. 142. If a man pleads, *delivered as an eſcrow*, and concludes ſpecially, and ſo *non eſt factum*, the general way is to leave it to the jury, becauſe it is in effect to ſay there was no deed at all; but it may be left to the court, by an *hoc paratus eſt verificare*, becauſe the court will judge whether the defendant

defendant hath exhibited ſuch matter as will make the deed of no effect, and therefore ſuch pleading as this is not conſidered as vicious. Vide Collins v. Blantern. 2 Wils. 341. &c. and an abſtract of it, ante Introd.

But if you plead breaking off the ſeal, razing, or any addition after delivery, you may conclude, and ſo *non eſt factum*, but the better pleading has been reckoned to conclude to the court with judgment, *ſi actio*, because the deed is not ſo apparently void, but that it ſeems neceſſary to leave it to the court, whether thoſe are circumſtances that would avoid it, or whether the defendant muſt give it in evidence on *non eſt factum*, as diſproving the deed. *Vide infra.* Nov. 112. Moor 30. Dalis. 105.

If a man pleads that the obligation was made to another, and not to the plaintiff; this is bad, becauſe it amounts to the general iſſue of *non eſt factum*. Sid. 450. Gifford and Perkins.

If the defendant pleads *quod factum prædict*, was made and delivered without date, and that the plaintiff added a date, and ſo *non eſt factum*, this is not good, for at the beginning of the plea, he confeſſes it to be his deed, and to be made and delivered by him, which at the latter end he denies, and ſo it is repugnant. Cro. El. 800.

If a man confeſſes an obligation, and pleads an *acquittance*, he cannot conclude, and ſo *non eſt factum*, but judgment *ſi actio*, for it is really his deed, though it be avoided by a contrary agreement, which muſt be exhibited to the court to judge of, ſo that the validity and eſſence of a lawful contract may be ſeen by the court, before the truth of the fact be called in queſtion before a jury. G. L. E. 168.

16 H. 7. 7. Sid. 450.

A man declared of an obligation made to himself, and on *non est factum* pleaded, the jury found an obligation made to another of the same name; this warranted the issue, for the only question in the action upon *non est factum* was, whether the deed profered in the declaration was the deed of the defendant; for if it were his deed, sealed and delivered to some other person than the plaintiff, the defendant ought to have confessed the truth of the deed, and avoided it, by pleading the special matter.

Alleyn. 41.

This is the same if the jury find the obligation to have been made to the plaintiff and another, and that he brought the action as survivor, but here the defendant might demand *Oyer* and *Demur*.

G. L. E. 169.

But where a wrong party is sued, that bears the name of the obligor, he may plead *non est factum*, for then it is not his deed.

Dyer, 279. 2 Cro, 558, 640. Ow. 48. Perk. 17. Moor. 807. Vide Essay II. V. Maby v. Shepherd, et ante this head.

The plaintiff brings an action against *W. S.* on *non est factum*, the jury find a special verdict, that *W. S.* entered into an obligation to the plaintiff, by the name of *T. S.* this is found for the defendant, because the jury do not find it the obligation of *W. S.* for the jury cannot take upon them any fact contrary to the specialty put in issue, and by the specialty it appears to be the deed of *T. S.*

35 H. 6. 9. b.

If the defendant pleads *non est factum*, and further *demurs* upon the obligation, the demurrer is void, because no man is allowed a double plea, to alledge the fact to be false, and that the charge is contrary to law, but he must take one plea that he thinks most advantageous, for if he should be allowed several ways of defence, it would multiply contention

tention infinitely, as we find by the practice of the *Chancery*, where they judge upon innumerable circumstances, and never reduce the whole weight of the cause to one issue.

But now by stat. 4 *Ann. c.* 16. the defendant, by leave of the court, may plead as many several and distinct pleas as he thinks proper. But he cannot plead and demur also to the same count.

Debt against *G. B.* executor of *J. B.* upon a bond made by *J. B.* the defendant pleads *Quod scriptum prædict non est factum suum*; whereas he ought to have said, *non est factum, J. B.* After verdict this was held to be good, because (*his*) shall be intended his bond, which the plaintiff declares on, and that was the bond of the testator, since the jury in their verdict have confirmed the relation to that bond in the declaration, Latch. 125.

On *non est factum* generally pleaded, a man may give special matter in evidence, as *razure, interlineation* or addition, for it is not necessary to plead any matter or thing specially, but what is exhibited to the court to judge of, and such plea concludes with an averment, *That you are ready to verify*; and the reason is, because it seems incongruous to make that absolutely necessary to be shewn to the court, which is shewn to them in vain, and that doth not come under their judgment; now when you shew that the supposed deed is void, you shew that it is not a deed. which amounts to the general issue of *non est factum*, and therefore you must not conclude to the court, but to the country; from whence it follows, that it cannot be absolutely necessary to set it out to the court, 11 Co. 26, 27.

 since

since it is left to the jury, and not offered to the court, for its judgment and determination.

Co. Lit. 283. a. 5 Co. 119. 1 Saund. 291. 1 Sid. 420. 1 Vent. 34. 3 Cro. 494, 528. 2 Keb. 525, 544.

If two men are jointly bound in an obligation, and one only is impleaded on *non est factum*, he cannot give this in evidence, for he did seal and deliver the deed, and so he hath contracted, though not solely; and this ought to be pleaded in abatement, otherwise it shall be intended that he is a lawful defendant, having admitted himself to be so, by the pleading in bar, and the other shall be intended not to have sealed, or if he did, that he is dead, and the contract survives.

G. L. E. 172. 2 Vent. 151. Bland v. Haselrig & al. Vide Salk. 440. Carth. 63, and 2 Mod. 280.

But if an *assumpsit* is alledged to be made by one, and upon issue proof is given of a contract made by two, this seems not to maintain the declaration. Vide *post*, under *non assumpsit*.

In the case in Ventris, *assumpsit* was brought against *four* who pleaded *non assumpsit infra sex annos*, and the verdict was, that one of the defendants did assume *infra sex annos*, and the others *non assumpsit*. *Pollexfen*, *Ch. J. Powell*, and *Rokeby*, were of opinion the plaintiff could not have judgment. *Ventris* inclined to the contrary.

Moor. 43.

In debt upon an obligation, the defendant pleads that there was a schedule annexed to this obligation, the which schedule is disannexed, and so *non est factum*, this is not good, for here he confesses the deed, and avoids it by saying, not that the deed itself is altered, for then it were not his deed, but by saying that the appendices relating to the deed are altered, which confesses the deed, and therefore cannot in the same breath be denied;

but

but this is a good plea if he had concluded to the court with judgment *ſi actio*, for it allows that there was ſuch a deed, but at the ſame time avoids the plaintiff's action, by ſaying that he himſelf altered the appendices thereunto relating.

But on *non eſt factum*, if the ſeal be broken off, after plea pleaded, it is the deed of the party.

[2.] *Of solvit ad diem, et solvit post diem.*

THE second issue is that of *solvit ad diem, &c.* and to explain this issue, it is to be considered, that when any contract is founded on a specialty, it cannot be dissolved but by specialty, for every contract must be dissolved by the same solemnity and notoriety wherewith it was made, otherwise, there is more evidence to suppose the continuance of the contract, than the dissolution; therefore, on a single bill * you cannot plead a naked payment, without a discharge in writing, because there is a solemn contract by which you are charged, and there cannot be any discharge but by matter of equal solemnity; but you may plead payment at the day, because the condition is contained in the very contract itself, and upon that matter of fact, the force of the contract depends, and when you discharge yourself by pleading the act required in the condition, then is the contract dissolved by something arising out of the contract itself, which is the same thing as if it were dissolved by a contract of equal solemnity.

* Payment may now be pleaded by 4 An. c. 16. § 12. but the annexed is stated to shew what the common law was.

2 Sid. 41. Where I am bound to pay a sum of money to two, payment to either of them is sufficient, because a man cannot pay the same to two several persons.

3 Keb. 471. Equity Cas. 145. pl. 3. Moor. 68. pl. 183. Payment to a scrivener, especially if he has the bond in his custody, is good, for the payment

ment to another for me, is a payment to me, and he appears to be deputed to receive this money, by having the bond in his custody.

Condition to pay money to the obligee, and the parishioners of *Dale* at such a day, payment to the obligee, and two of the parishioners is well enough, for this answers the condition, since *two* is the plural number. G. L. E. 174.

Condition to pay ten pounds to *A*, it is a good performance to pay it to his deputy, *nam quicquid agitur per alium, agitur per se.* 2 Ed. 3. 3.

Where a man gets judgment, payment to his attorney is well enough, for he is not only intrusted, and put in the place of the creditor to get judgment, but to take the effect of that judgment; and since the attorney might take out execution, he may accept payment of the money, instead of taking out execution; therefore the debtor ought to be indemnified by the law. Lit. Rep. 54. Hetley, 46. 2 Keb. 249.

Debt on an obligation of two hundred pounds, defendant pleaded that after the day of the writ purchased, *viz.* such a day, *apud, &c.* he paid to the plaintiff sixty pounds, parcel thereof which he received, judgment *de brevi, &c.* upon special demurrer, adjudged for the plaintiff, because the defendant did not shew any acquittance or release, proving this payment, which if he had done, the writ would have abated for the whole; but since he did not produce any deed of acquittance, his plea shall be no more than a naked averment, which can never overthrow any obligation which is of an higher nature, and consequently cannot abate the writ which is founded thereon. Cro. El. 884. Colbrook and Foster. 5 H. 7 41. Doct. and Stud. Dial. 1st chap. 12

5 Co. 117, b. In debt on an obligation of ten pounds, the defendant pleads that one *H.* was jointly bound with him, to whom the plaintiff had made an acquittance, bearing date before the bond, but delivered after it, in which he acknowledged the payment of twenty shillings, in *full satisfaction* of the ten pounds, and adjudged a good bar; for if a man acknowledges himself satisfied by deed, it is good against him, though he has received nothing, since he shall not be allowed to contradict what appears under his hand and seal.

Cro. El. 281. Fox and Lee. Condition to pay seventy pounds, viz. thirty-five pounds at one day, and thirty-five pounds at another day, at the *Temple* church; the defendant pleads payment of the seventy pounds at *Ludlow*, *secundum formam et effectum*; and held good, *reddendo singula singulis*, as if he had pleaded payment of the several sums at the several days. But since the stat. 4 *An. c.* 16. *Solvit ad diem, and by leave of the court, Solvit post diem may be pleaded generally.*

22 Ed. 4, 25, a Bro. title Condition Pl. 181. Debt on bond by a Bishop, the defendant pleads he paid the money at the day, to *J. S.* bailiff of the plaintiff, and by his command, and avers that this came to the use of the Bishop; this averment makes the plea double, for if the bailiff receives this by command from the Bishop, though it does not come to the Bishop's use, yet it is a sufficient discharge to the defendant.

Quære, Whether the plea is not good, (for "that it came to the use of the Bishop," seems to be surplusage) unless there be a special demurrer?

Debt

Debt upon a bond, the case was, that the defendant owed to the plaintiff a certain sum of money by bond, and certain money for wares sold, and at the day of payment on the bond, he tendered the money according to the bond, which the plaintiff accepted, and said that it should be for the book debt, and not for the bond debt; but the defendant said he paid it on his bond, and no otherwise; the plaintiff however crossed his book, and brought debt on the bond, and adjudged against him, for the defendant is to appoint the manner of payment. *Sed qu. if not otherwise, had the defendant paid the money, without saying upon what account?* Cro. El. 68. 2 Str. 1194.

In debt on a bond of 200*l.* conditioned to pay 105*l.* &c. the defendant pleads payment of the aforesaid sum of 100*l.* at the day, the plaintiff replies, *quod non solvit præd.* 105*l.* *et hoc petit,* &c. and it was found for the plaintiff, and judgment given for him, which was afterwards reversed, because the plaintiff and defendant do not join in a point, and therefore there is not any issue, nor verdict upon it. Cro. Jac. 585. Sandbank and Turvey.

But where the defendant pleads to debt on bond, payment of 50*l.* on the 14th of *June,* &c. and the plaintiff replies, that he did not pay the 50*l.* on the said 14th of *August, supradict quas ei ad eund. diem solvisse debuisset;* and verdict found that he did not pay it the 14th of *June,* yet it is not error, for the defendant's plea was according to the condition, and the plaintiff's replication *quod non solvit,* the said Cro. Jac. 549. Bonitham and Hall.

14th

14th day was good, for the word "*August*," was ſuperfluous, and *prædict.* 14*th die* without more, had been ſufficient; but in the former caſe there was another ſum in the plea of the defendant, than was in the condition, and another ſum in the replication than was in the bar, ſo that there could be no iſſue.

Cro. Car. 231. Parker and Taylor. Sid. 215. Charlton and Fincy.

In debt on an obligation the defendant pleads *ſolvit ad diem & de hoc ponit ſe, &c. et prædict.' querens ſimiliter*, and in error it was inſiſted on that the defendant ought to have concluded his bar with *et hoc paratus eſt verificare*, and then the plaintiff ought to have replied *non ſolvit et hoc petit, &c.* ſo there had been an affirmative and negative, but rejected, for there is an iſſue, and the error is only in the formality of joining it, ſo that is aided by the ſtatute of jeofails.

Though at the common law, the penalty in a bond became forfeited, if the money was not paid on the day ſpecified in the condition, yet, now by *ſtat.* 4 *An. c.* 16. § 12. if the principal and all intereſt be paid after the day, and an action be notwithſtanding brought upon the bond, ſuch payment may be pleaded. The uſual way now, is to plead *ſolvit ad diem, & ſolvit poſt diem*; I would adviſe a defendant always to plead the general iſſue with the other plea, as ſometimes his witneſſes may not be ready when the cauſe is called on: the plaintiff may be in the ſame predicament, and compelled to withdraw his record.

Suppoſe an action brought upon the bond, before payment, by *ſec.* 13. of the ſame *ſtat.* the defendant may bring into court principal, intereſt and coſts, in law, (and equity if any) and proceedings will be ſtaid.

[3.] *Of Non-assumpsit.*

G. L. E. 182. IN actions of *assumpsit* the general issue is *non-assumpsit*; which denies that you undertook to pay that wherewith you are charged in the declaration; this action doth not charge a man with a *debt*, for if a party, in case of simple contract were charged with a *debt*, he might discharge himself by *law-wager*; but *assumpsit* charges a person with the *damage* for not performing that promise whereon the plaintiff depended, which being a charge that supposes a deceit, or injury, *law-wager* is not allowed.

(*a.*) *Of an assumpsit in* Deed, *and an assumpsit in* Law.

Before we proceed to an enumeration of particular cases, it may not be amiss to lay down a few general rules as to an *assumpsit* in *deed* and an *assumpsit* in *law*.

Dy. 210. Alleyn. 28. Style 62. Cro. El. 292. 1 Sid. 236. 1 Mod. 210.

With respect to the difference between an *assumpsit* in *deed*, and an *assumpsit* in *law*; in an *assumpsit* in *deed* where the contracts are mutual, and either side declares for non-performance, there he must set forth the very contract, and if he mistakes in quantities or sums, he fails, because his injury is in the non-performance of the very contract alledged in the declaration, and if he does not shew such a contract, he does not intitle himself to a recompense for the breach of it. *Vide infra* (*b.*)

But where he brings his action for an assumpsit in *law*, if he shews part of the goods delivered, or part of the money lent, it is good; because on every several delivery of goods, or receipt of money, the law implies a several contract for retribution, and there the gist of the action is not whether such a particular contract is broken, but whether the goods were delivered, or money advanced to the defendant, and the quantities of the goods or the sum is no farther material than to increase or lessen the damages. G. L. E. 193.

(b.) A Case *on the Subject, with the* Arguments *of Counsel, and* Judgment *of the Court.*

An *assumpsit*, wherein the plaintiff declared that the 27th of June, 1712, at *Hoddesdon*, the plaintiff bought of the defendant, and the defendant bargained and sold to the plaintiff, one hundred quarters of as good barley as one *William Ford*'s was, and of as good measure as the said *Ford*'s was, to be delivered to the plaintiff at *Hoddesdon*, between *Harvest* and *Candlemas* in the same year, where the plaintiff should appoint, after the rate of sixteen shillings *per* quarter, to be paid by the plaintiff to the defendant, whereof the plaintiff paid to the defendant two shillings and six-pence in hand, and agreed to pay the residue at the times of delivery, according to the quantity of the same, at every time of delivery, and according to the rate aforesaid; that the defendant after the bargain, in consideration of the premises, assumed that he would deliver to the

G. L. F. 194. cites Peeram v. Palmer. Vide post, Leslie's case.

the plaintiff the ſaid barley ſo bargained and ſold according to the bargain: Breach, non-delivery. On *non aſſumpſit* the jury found found four pounds four ſhillings damages, which was ſubject to the determination of the Lord Chief Juſtice *Parker*, on this caſe, agreed between the parties.

The defendant on *Saturday* the laſt of *January*, (*Candlemas* day being the *Monday* following) in the year 1712, and not before, delivered to the plaintiff's uſe at Mr. *Plumer*'s malt-houſe at *Hoddeſdon* (where the plaintiff appointed the barley to be delivered) a quantity of barley which was ſent for twenty quarters, but when the ſame was meaſured by *Ford*'s buſhel it was found to be but nineteen quarters and an half, according to that meaſure.

That the plaintiff at that time paid to the defendant's ſervant who brought the barley, ten pounds and no more; for although he had the money, not only for what the twenty quarters of barley, but likewiſe the one hundred quarters came to, according to the agreement, ready by him in the houſe; yet becauſe the barley did not hold out in meaſure, he paid only ten pounds, and did not pay the other ſix pounds at that time, but afterwards paid it to the defendant, before the action brought.

That the price of barley between the time of the contract and the delivery of the twenty quarters, roſe about, *&c.*

If upon theſe facts proved, the plaintiff upon this declaration hath good cauſe of action or not, was referred to the determination of his Lordſhip.

Counſel argued to the following purport.

In

In confidering of this matter two queftions are to be ftated.

Firft, Whether the plaintiff has a right to the refidue of the one hundred quarters of barley, not having paid the full price for the nineteen quarters and an half, within the time prefixed, but only ten pounds towards it?

Secondly, Whether the defendant can take any advantage of this non-performance upon the iffue of *non-affumpfit*?

As to the *firft* point, whether the plaintiff has a right to the refidue of the one hundred quarters of barley, not having paid the full price for the nineteen quarters and an half within the time prefixed but only ten pounds towards it?

And here it is neceffary to lay down two or three rules that have been made ufe of in adjudging feveral cafes in the books, and then compare this cafe with thofe rules.

The FIRST *rule is, that where there are feveral promifes which are mutually executory, and independent of each other, there the promifes are confiderations each for the other, and the plaintiff may bring his action for breach of the defendant's promife, even though his counter-promife be alike broken; becaufe in fuch cafe, the counter-promife, and the remedy upon it, is the confideration of the defendant's agreement and not the plaintiff's performance of his promife*, according to *Juftinian's* rule in the civil law, *qui actionem habet ad rem recuperandam, ipfam rem habere videtur*; and upon this reafon touching mutual promifes there are feveral cafes refolved in the books, *Hob.* 88. 106. 1 *Rol. Rep.* 125, 336.

V. 7 Co. 9, 10, &c. 1 Ld. Raym. 665, 666. Style, 186. 2 Mod. 33, 34. Hob. 41. Sed vide, 1 Salk. 172. V. 2 Mod. 62. Juftin. de Regulis Juris, 361.

And

And I believe they on the other ſide, will not deny me this, which I lay as a ground and foundation from whence I would argue, ſince it ſtill remains a queſtion whether the promiſes ſet forth in the declaration are independent of each other.

The SECOND rule that is laid down in the books, touching theſe mutual promiſes, is this:

That where there are any words made uſe of in a promiſe, covenant, or agreement, that do not import a CONDITION, *they are never conſtrued to be* CONDITIONAL, *for otherwiſe the party would be deſtitute of all manner of remedy, without ſuch conſtruction.*

Hob. 41. Owen, 54. This is laid down in *Hob.* 41. in the caſe of *Cooper* and *Andrews*, and in *Owen* 54. and in ſeveral other books, which I ſhall beg leave, by the by, to mention to your Lordſhip.

And it is in itſelf a rule, founded upon the greateſt reaſon; that where words in themſelves do not expreſs a *condition*, the law will not frame any conſtruction to make them *conditional*, unleſs ſuch an implication be abſolutely neceſſary; and it cannot be abſolutely neceſſary where the parties have another remedy.

There are a multitude of caſes reſolved upon this rule: I will only beg leave to mention ſome few, becauſe I ſuppoſe that if this rule be fully ſatisfied, it will conſequently determine this point for the plaintiff.

Hob. 41. If an annuity be granted *pro conſilio impenſo vel impendendo*, there the word *pro* is conſtrued to be a *condition*, becauſe the party has no other remedy for the counſel than by ſtopping the annuity; and this is laid down as the reaſon.

If

If an action be brought upon the common covenant for quiet enjoyment in a leaſe, that the leſſee ſhall quietly enjoy, paying the rent and performing the covenants, there, though the word *paying* would make a *condition*, if the party were without remedy, yet it is not conſtrued to be *conditional* in this covenant, but the defendant is left to his remedy upon the reſervation of the rent, and covenants in the leaſe.

And ſo it was reſolved in the caſe of *Allen* and *Babington*, reported in 1 *Sid.* 280. 2 *Keb.* 23. and in the caſe of *Hays* and *Bickerſtaff*, in 2 *Mod.* 34, 35. *Vid.* 1 *L. Raym.* 666. 1 Sid. 280. 2 Keb. 23. 2 Mod. 34, 35.

So is the caſe in 1 *Rol. Abr.* 415. Articles of agreement made by *A.* on the behalf of *B.* and by *C.* and a covenant that *B.* for the conſiderations aforeſaid in the deed expreſſed, ſhall convey certain lands to *C.* in fee, and *C.* covenants on his part, *pro conſiderationibus prædict.* to pay *B.* one hundred pounds; here, though *pro* would make a *condition* in the caſe of an *annuity*, yet the book ſaith, that notwithſtanding *B.* doth not aſſure the lands to *C.* yet *C.* is bound to pay the money, and to take his remedy againſt *A.* on his covenant. L. Raym. 665. 1 Rol. Ab. 415. 2 Leon. 211. 3 Leon. 219.

The ſame law is laid down in the caſe of *Nichols* and *Rainſbrede*, reported in *Hob.* 88. There *Nichols* brought an *aſſumpſit* in conſideration that he promiſed to deliver to the defendant, to his own uſe, a cow; the defendant promiſed to pay him fifty ſhillings; adjudged that the plaintiff need not aver the delivery of the cow, becauſe it is promiſe for promiſe. Hob. 88. 1 Lutw. 250. 1 L. Raym. 665. Sed. V. 1 Salk. 172.

Thirdly, But if the defendant's promiſe do ariſe on the CONDITION *of ſome* ACT *to be done* 3d Rule. 1 L. Raym. 665. 15 H. 7, 10. b.

and performed, and NOT *on a* PROMISE *to do and perform something, there the act must be first executed, and averred to be performed, before the defendant's promise can arise; for here the* PERFORMANCE *is the consideration, and not a counter-promise.*

1 Rol. Rep. 125, 336.

So is the case, 1 *Rol. R.* 125, 336. in consideration of ten pounds I promise to deliver to you all the books of the law; it is good without alledging the payment of it, for the other may have an action for it; but if it be, that in consideration that if you will pay (in the future tense) to me ten pounds, I will deliver to you all the books of the law, it is not good without alledging payment of the ten pounds; he must aver the thing to be done, because, says the book, there is no remedy on this promise, since it does not arise until the money is paid, for the party does not promise to deliver the books, 'till after payment of the money.

Hob. 106. 7 Co. 10. b.

So is the case of *Hob.* 106. If I promise, in consideration of a man serving me a year, that I will pay him ten pounds, there the service ought to be actually performed, before he shall bring his action for the money; because the *promise* for the ten pounds arises not from the promise to serve, but from the *actual service.*

3 Leon. 219.

So *Brocas*'s case in 3 *Leon.* 219. The Lord of a manor covenanted with his copyholder to assure unto him and his heirs, the freehold and inheritance of his copyhold; and the said copyholder, in consideration of the same performed, covenanted to pay such a sum; the court held that the copyholder was not bound to pay the money, before the assurance made, and the covenant performed; but if the words

had

had been, *in consideration of the said covenants to be performed*, then he is bound to pay the money presently, and to have his remedy over by covenant.

In all these cases the consideration of such promises are not the *counter-promise* or *agreement*, but the *performance*: but where the consideration is merely a promise or agreement to do something, there the first promise arises before such agreement on the plaintiff's part is performed or fulfilled.

Now to compare this case to the precedent rules.

First, there are no words that are *conditional*, for the promise is not expressed in any conditional terms, that *if* he be paid for the delivery of the first barley, *then* he shall deliver the rest.

But the words of the bargain, are altogether absolute, for they set forth, that the plaintiff *bought* of the defendant, and the defendant *bargained and sold* to the plaintiff, one hundred quarters of barley, according to the rate of sixteen shillings *per* quarter for every quarter, to be paid by the plaintiff to the defendant; and that the consideration of this bargain, was the payment of two shillings and sixpence in hand, which was the only act *executed*; and the act *executory* was the *agreement* to pay the residue at the times of the delivery of the barley, according to the quantity of the barley, at every time delivered, and according to the rate to be paid.

Now in this *executory* act, there is nothing laid that is *antecedently* to be performed, before the first promise is to rise; since the first promise doth import a compleat bargain and sale, of the one hundred quarters; and such promise is not *to* arise, upon any *precedent con-*

 dition

dition, or act, to be *first* performed, or done by the plaintiff.

And if there be words in the bargain that import a *condition*, and the counter-promise is in its own nature *executory*, the law will not raise a *condition*, upon any *implication* whatever, but leave the parties to their mutual remedies.

The rather in this case, because, if the whole had been delivered at once, then plainly there had been nothing conditional in the bargain; and if the defendant provided himself, that there should be several deliveries, and does not actually provide by an express condition, that if the money be not paid, for what he had delivered at once, he shall not go on to deliver, the law cannot create such a *condition* by *implication*, since the promise on the plaintiff's part, is totally *executory*, and there is no act *executed* or stipulated to be performed, before the promise rises.

And if there were any such act *executed*, that was necessary as a *precedent condition*, to the raising of the promise, on which the plaintiff declares; it would be an objection to the declaration; for the not averring such *precedent condition* to be performed: but that they on the other side cannot pretend to, and if they should, the authorities would be plainly against them.

Yelv. 133, 134. And for this there is the case of *Bettisworth* and *Campion*, reported in *Yelv.* 133, 134.— The plaintiff, as executor to his father, declares, that there was a communication and agreement, that the defendant should have all the iron made at such a furnace, paying after the rate of forty shillings *per* ton, upon which the testator did assume to the defendant, that he should have all the iron made in that furnace; in consideration whereof the defendant

promised

promiſed to pay the teſtator according to the rate aforeſaid, and ſhews that the defendant had ſo many tons, which amounted to ſo much money; and it was objected, in arreſt of judgment, that the plaintiff had not ſhewn that the conſideration was performed on his part, and that the defendant had all the iron made at the furnace, which was the conſideration that induced the defendant to make this promiſe; but it was anſwered, and reſolved by the court, that the conſideration on the part of the plaintiff was not, that the defendant ſhould have all the iron, as an act *executed*; but that the teſtator *promiſed* that defendant ſhould have all the iron; ſo that the conſideration on each part, was the mutual promiſe, the one to the other, for which there is a mutual remedy: ſo here, that which induces the defendant's promiſe to deliver the one hundred quarters of barley, is not the actual payment of any ſum, more than the two ſhillings and ſixpence mentioned in the declaration.

But it is the promiſe to pay the reſidue, which is undertaking for a *future* act *executory*, and ſo expreſſed in the *future* tenſe, that it ſhould be paid on the delivery of each quantity of barley; wherefore it is the *promiſe* to pay, and not the *actual payment*, which here makes the conſideration.

Secondly, The *ſecond* queſtion is, whether the defendant can take advantage of this, on the iſſue of *non aſſumpſit*.

And for this my Lord *Hobart*, *Fol.* 106. is expreſsly to the contrary; there the conſideration was, that if a man ſerved me a year, I ſhould pay him ten pounds, in that caſe my Lord *Hobart* ſays, that if the ſervice was not done, and yet the promiſe made, *prout*, &c. Hob. 106.

the defendant must not traverse the *promise*, but he must traverse the *performance* of the service, because they are distinct in fact, though they must concur to the barring of the action.

And here the true difference seems to be, between an *assumpsit* in *deed*, and an *assumpsit* in *law*; for an *assumpsit* in *law* in considera-tion of money received, from the natural justice of the thing, creates a promise 'till payment; here the actual payment or satis-faction, or a release, or any other matter, that excuses payment, may be given in evidence on *non assumpsit*.

For when the natural justice for repay-ment of the money ceases, there the law no longer creates a promise; and therefore those matters that go by way of *excuse*, are proper evidence upon *non assumpsit*; because there is really no promise, when the defendant can shew there is no justice to pay the money.

But where the promise rises by the *act* of the *parties*, and the defendant would shew any thing for an excuse, for non-performance, there he must shew it to the court by proper pleading, because it confesses the *existence* of such promise, or that such promise was actually made by the parties, and avoids it by shewing some special matter, or reason for not perform-ing it.

1 Sid. 236. 1 Mod. 210. Alleyn, 29.

This distinction was taken in the case of *Bedford* and *Clarke*, 1 *Sid*. 236. and in the case of *Fitz* and *Freestone*, 1 *Mod*. 210. and *Al-leyn*, 29.

Pro Def.

It was argued for the defendant, that such bargains are made for ready money, and if the plaintiff promises to deliver such goods, and the defendant promises to pay for them, in common understanding, if the goods are ten-

tendered, and the party has not the money, that this shall excuse; and for this they quoted 17 *Ed.* 4. *fol.* 1. where an action of trespass was brought by the plaintiff against the defendant, for breaking his close and taking his corn, and quotes cases there pleaded, that a long time before the trespass supposed, the plaintiff and defendant bargained at such a place in *London*, that the defendant should go to a place where the oats were, and see them; and if they pleased him, when he saw them, that then he should take them, paying the plaintiff three shillings and four-pence an acre one with another. 17 Ed. 4. Fol. 1.

That the defendant went to see them, and was content with the bargain, and for that reason took the corn, which is the same trespass: it was there objected that this plea was not good, because he had not paid the money, according to the bargain; and it would be mischievous if upon such communication a man should take another man's property before the money is paid; and *Littleton* there put a case, that if a man should come to a draper, and demand of him how much he will have for such a piece of cloth, and he says so much; upon which the other says he will give him so much for the cloth, but does not give him the money; if he takes the cloth, the draper may maintain an action of trespass: so *Coke* put a case, that if a man should ask how much he should give for my horse at *Smithfield*, and I say so much; if the other does not pay down the money immediately, I may sell the horse to whomsoever I please; for otherwise I should be compelled to keep my horse against my own consent, until such time as the man should pay, which was certainly against the intention of

the parties in their agreement; and *Littleton* said, that in all such fore-handed bargains, there was a condition implied in law, that it should be delivered upon payment, and that if payment did not follow, the whole contract should be void; and it was argued in this case, that common usage implied such a condition, where the goods were to be delivered for ready money, and that if the money was not paid, I should not be obliged to part with my property.

PARKER, Chief Justice, *resolved*, that the non-performance of such a bargain might be properly given in evidence, upon *non assumpsit*; for now *non assumpsit* is held to be the general issue in this action, though they formerly held the contrary.

But as to the bargain itself, he said that the defendant having delivered nineteen quarters and a half, without ready money, there he had dispensed with the condition, as to that quantity; for though he might have chosen whether he would have delivered it, until he was paid, yet when he did deliver it upon credit, and without the ready money paid down, it was a dispensing with the condition, as to that quantity; and then there was no reason but that he should go on with the delivery of the residue, according to his contract; for suppose a *condition* should go along with it, as it is agreed for the defendant, that upon every delivery a ready payment should be made, yet if the defendant has dispensed with the condition, as to the quantity delivered, by letting the plaintiff have it, without prompt payment; yet, that will be no reason, why he should not go on to make the delivery of the residue, according to his bargain; for

if

if the argument be good, that the law implies a condition upon the delivery of every quantity, that there ſhould be prompt payment made by the plaintiff, yet it will not raiſe a *farther* condition, that if he deliver the firſt quantity upon credit, that he ſhould not go on to make a delivery of the reſt, for ready money, which here the defendant has not done; and it was by no means to be admitted, that if the defendant had delivered part upon credit, which was his own folly, that it ſhould excuſe him from delivering the reſt, for ready money, according to his promiſe.

(*c.*) *As to a Wife's binding her* Huſband *by her contract.*

The wife cannot by her contract bind the huſband, for the huſband is the ſuperior and governing power, and the law has intruſted him with the conduct of the whole family; and therefore the wife's acts in bargaining are wholly void, and if found by ſpecial verdict, are not ſufficient to bind the huſband. Scott and Manby, 1 Sid. 109, 128. 1 Mod. 124. 1 Brown, 47.

But the act of the wife contracting, is preſumptive evidence, to induce the jury to ſay it is the contract of the huſband; for if the huſband permits another to contract for him, it is his own contract; and where the wife cohabiting with the huſband, takes up goods in his name, this *prima facie* is to be preſumed the contract of the huſband, for the preſumption is that the huſband will truſt ſo near a relation to act for him. G. L. E. 183, &c.

But if at the time of the contract, the wife were abſented from the huſband, without his conſent, this is ſo far from being the contract of the huſband, that it is rather the contrary; Ibid.

for

for it cannot be presumed that a husband should trust a wife eloped, as his agent, to act for him, so that her contracting in his name, is not any evidence to charge him.

G. L. E. 183, &c. The usual employment of the wife, cohabiting with the husband, is good evidence, but this is not conclusive evidence; for possibly she might have been always employed with ready money: but if the husband has paid the debts of the wife, where she has been trusted, it is strong evidence against him.

Ibid. If the things were necessary for the husband, wife, and family, it is good evidence of a contract to bind the husband, but yet, not *conclusive* evidence; for though the things are of necessity, yet possibly that necessity might be otherwise provided for; and they must be necessary not only for his degree, but to his estate also, to make the evidence more conclusive.

Ibid. Again, it is good evidence to prove the contract of the husband, to shew that the things bought by the wife, came to the use of the husband and his family, and yet this is not *absolutely conclusive*, for possibly he had no notice that they were bought on credit, otherwise he would not have used them.

Ibid. So if the husband be absent from his family, and things are bought by the wife, this is good evidence to prove to the jury that the wife did contract in the place of her husband; but this is not *absolutely conclusive*, for possibly he left ready money, or made some other provision for his family.

Ibid. 1 L. Raym. 444. If the husband forbid any person to trust his wife, and he do trust her, this is an evidence that the husband never designed to contract with that person, by means of his wife,

 and

and therefore he cannot charge the husband on any such contract.

There is a great difference between evidence offered to the jury, and offered to the court on a special verdict; for if the jury find that the wife contracted for necessaries in the absence of her husband, this is good evidence to convince the *jury* that the husband did contract, and that his will was concurring and went along with her in the transaction; but if this be found and offered to the *court*, the *court* cannot adjudge it to be the contract of the husband, for the jury are the only judges of the fact, and they are to make the deductions and conclusions as to the truth of the fact, from the evidence as it lies before them. G. L. E. 185.

But the court cannot make any deductions or conclusions as to the truth of the fact, unless they flow *necessarily* and *demonstratively* from the evidence that the jury have stated, for they are not judges of *probable* or *improbable*, but of *lawful* and not *lawful*: if, therefore, the jury do only lay before the court such evidence as would induce a man to believe that the contract of the wife was the contract of the husband, they cannot adjudge it to be so, for they are not judges of the *probabilities* of *facts*, but of the *law* only; and therefore if the jury do not lay before them the infallible signs of a contract, the judges, who are to intend nothing, cannot adjudge it to be a contract. 10 Co. 56. b. 57. a. 1 Mod. 17, 38.

(*d.*) *Of* Infancy *being given in Evidence.*

Upon *non assumpsit* the defendant may give *infancy* in evidence, in discharge of the promise; 2 Keble, 851. Painter and Bowan.

2 Lev. 144. Tri. per Pais, 398. 1 L. Raym. 389. * 5 Co. 119. a.

mise; but if a man were at issue upon *non est factum*, * *infancy* cannot be given in evidence, but must be pleaded; for where the issue relates to a solemn contract, executed with the necessary solemnities, which contract had a being and an obligation, at the time of making, that is a full proof of the issue; for where a solemn contract has a force, the court ought to see that it is legally dissolved; but where there is a contract in issue, that is not presumed to be executed with any solemnity, there a man may give in evidence, on the general issue, that it had not any obligation, by reason of *infancy*; for where there are not solemnities of contracting exhibited to the court, there it is not necessary that the court should see the discharge of that contract; and therefore if the party in the issue, proves himself an infant, * it amounts to proof that he could not assume, and consequently that there was no *assumpsit*.

* An infant may contract for his benefit. His promise is not void, but voidable. Vide infra.

1 Vent. 51. 1 Mod. 25. 1 Sid. 41, 446. 2 Str. 939.

An *infant* brings an action for six pounds, for which the defendant became indebted upon a promise if the plaintiff would permit the defendant to cut his (the plaintiff's) grass and carry it away to pay him six pounds; it is no objection to say, that the plaintiff is an *infant*, and so could give no such permission, but was intitled to an action for cutting of his grass, for the contracts of the infant are not *void*, but *voidable* at the election of the infant, and therefore here is a good consideration, if the infant will abide by his bargain.

(*e*.) *Far-*

(*e.*) *Farther of Evidence in Assumpsit.*

Upon an *assumpsit*, covenant under hand and seal to pay the money, is not evidence, nor is any specialty or matter of record, or any contract for *rent*. Cro. Jac. 506, 598. Hob. 284. Cro. Car. 343.

Sed qu. as to rent, since the stat. of 11 *Geo.* 2. *c.* 19. *For, by* § 14. *of that act, where the demise is not by deed, the rent may be recovered in an action upon the case.*

A promise to restore an horse hired for a journey, and the defendant gives in evidence, that the horse died in the journey, without the rider's fault, the obligation of his promise is avoided, inasmuch as it becomes impossible, by the act of God, without any fault of the defendant; and no man's promise shall be supposed to extend to impossibilities, for what is impossible to be done, is not the subject of any man's promise. *Quære*, whether it makes this *assumpsit* originally void, or whether it avoids it by such subsequent matter, as ought to be pleaded, as payment avoids the contract, and yet ought to be pleaded? *Sed q. farther, as to payment, where the promise is a promise in* law? *Vide ante.* G. L. E. 187. Tri. per Pais, 399. Lesley's Case. Cited in Matraver's Case, 1651. B. R. Vide ante the Case of Peeram v. Palmer.

Delivery of goods is evidence of a sale on a *quantum meruit*, because they shall be supposed to be delivered on a bargain, and with expectation of the price of them. G. L. E. 187. Cites Sussex. Ass. 1701.

In an *assumpsit* the plaintiff declares that the defendant, in consideration of marriage, assumed to do such a thing; upon *non assumpsit* the plaintiff proves a promise, in consideration of marriage, to do three several things, of which two were performed, and the third left undone, for which he brought the action. To this, objection Godbold, 154.

jection was taken, that the contract proved was ſubſtantially different from the contract alledged; for to do three ſeveral things, and to do one thing, are not the ſame, but ſubſtantially different; and the exception was allowed, and the difference taken between a verbal contract and a deed; for if the contract had been by deed, the plaintiff might have declared for non-performance of one only, becauſe it appears by the *profert*, that the contract alledged, and the contract proved, are exactly the ſame, and therefore a complaint for non-performance of the one only, will be well enough; but on a verbal contract, you muſt prove the individual contract you ſet forth in your declaration, for if a latitude were allowed that contracts might be taken to be the ſame that ſubſtantially differ, no man by the allegation could prepare a defence; for among the great variety of tranſactions that are among mankind, ſeveral contracts might have an analogy and reſemblance one to another, and therefore the ſame individual contract which is alledged, ought to be proved.

G. L. E. 188. Tri. per Pais, 402. Franklin v. Walker. Nort. Aſſiſe, 1667.

Upon *indebitatus aſſumpſit* brought by one; if the defendant gives in evidence, that another was partner with the plaintiff, at the delivery of the wares, the plaintiff muſt be nonſuited, becauſe the law, on delivery of the goods, creates a contract to them both. *Sed qu. for I conceive it ſhould be pleaded in abatement? Vide* 1 *Salk*. 32, 290. 4 *Mod*. 181. *Sho*. 189. 2 *Lev*. 113. 3 *Lev*. 290, 353. *Carth*. 170.

G. L. E. 189. Cites 2 Vent. 151. But the book does not ſupport this propoſition. There in aſſumpſit againſt four,

If an *aſſumpſit* be alledged to be made by one, and upon the iſſue of *non-aſſumpſit*, a contract made by two, is proved, this ſeems not to maintain the declaration; and the reaſon of the difference between this and an action upon bond

againſt

against one of two joint-obligors, who plead *non est factum* is this, that upon every contract with solemnity, there is a *profert* made of it to the court, so that it will evidently appear, whether the bond stated in the declaration, and that produced be the same or not; and if there is a material variance, it may be taken advantage of by *demurrer* or pleading *, but by pleading *non est factum* the defendant admits himself liable to be sued alone. It is otherwise in *assumpsit*, where there is not any *profert* made of the contract: in such case the defendant does not know what the plaintiff intends to prove, and therefore he must prove the same contract that is alledged in the declaration, without any substantial variance, for nothing can be inferred from the defendant's pleading in bar to this solemn contract, as he could not know until he came to trial, that the plaintiff intended to charge him with a joint contract.

upon plea of the stat. of limitations, the proof was of one only promising within six years, and three judges against one held plaintiff could not have judgment. In support of the proposition, Vide 2 Mod. 280. Salk. 440. Carth. 63.

Vide Salk. 440. Carth. 63. and 2 Mod. 280.

A principal part of the annexed reasoning is taken from Gilbert, *but many alterations have been made, to render it intelligible, which is far from being the case in the original.*

* Though the plaintiff declare against one, upon an obligation by two, he need only mention that the defendant, by a bond of such a date, became bound in such a sum. If those facts are truly stated, *non est factum* is not an answer. Defendant should plead in abatement another co-obligor not named, and who ought to have been joined in the action. *Vide ante*, I. [1.]

(f.) Of

(*f.*) *Of laying the* ſubſtantial *part of the* promiſe *in the* declaration.

G. L. E., 190. Cites Maidſtone Aſſ. 1700.

In every *aſſumpſit* the ſubſtantial part of the promiſe muſt be laid in the declaration; as if a man be to deliver goods according to a ſample, he muſt lay it ſo in the declaration, for courts of juſtice muſt go according to the *allegata & probata*; and it is not enough that a good contract be proved, unleſs it is alledged. If the contract be proved otherwiſe than as alledged, that is not good evidence to maintain the declaration, as it cannot be ſuppoſed to be the ſame contract with the contract alledged, and therefore the party muſt fail in the proof of that *aſſumpſit*.

Vide ante (*a.*) (*b.*) of an aſſumpſit in deed, and an aſſumpſit in law.

G. L. E. 190.

But if a man aſſumes to pay ſo much money for hops if delivered well packed, picked, dried and bagged, this is good evidence on a general *aſſumpſit*, becauſe ſo they ought to be, whether contracted for or not, for the party ought to make them merchantable goods, and ſee them well delivered, without any ſpecial proviſion in the contract, though there were no more than a general ſale of the commodity.

G. L. E. 190. Tri. per Pais, 399. Style, 461. Thomas and Gery.

One brings an *aſſumpſit* for twenty pounds, and gives in evidence a promiſe that if two would ſurrender their right, he would pay them twenty pounds a piece, and that they did ſurrender their right, this is good evidence to maintain the declaration, for though the promiſe is laid in the declaration abſolutely, and the promiſe in proof is upon condition, yet when that condition is performed, the

the duty becomes abſolute, and ſo is good proof upon this declaration.

An *aſſumpſit* for fifteen quarters of malt; evidence of fourteen or fifteen quarters of malt, and the plaintiff non-ſuited, becauſe not the ſame promiſe; but on obligation to deliver twenty bales of wool, or twenty pounds, upon non-payment by the obligor, the obligee may ſue on either.

G. L. E. 191, cites Turner's caſe. Hill. Aſs. 1701. in Suſſex per Trant. 15 Ed. 4. 4. b.

(*g.*) *Of one* entire agreement, *being, by the act of a party, turned into* ſeveral contracts.

An *indebitatus aſſumpſit* on a contract, in which the plaintiff ſold ſixty combs of rye to the defendant, at fourteen ſhillings *per* comb, to be delivered at or before *Michaelmas*, and the money to be paid on the delivery of the laſt rye, and the proof was that fifty combs were delivered before *Michaelmas*.

G. L. E. 191. Tri. per Pais, 400.

Firſt, Though this agreement be entire for ſixty combs, yet the parting it in the delivery makes it in the nature of ſeveral contracts, for the one party ſends it in, and the other accepts it, in purſuance of their agreement: if no other contract can be proved, it ſhall be underſtood to be a partial agreement as to the fifty combs, for the ſubſequent acts of the parties ſo expound their contract, that it ſhall be underſtood that the rye might be delivered by parts.

Secondly, Though the contract was that the payment ſhould be on the delivery, yet a time being ſet for the delivery; it muſt be intended that the money ought to be paid

when the delivery ſhould have been made; and the time being paſt, it became a duty, and an *indeb. aſſumpſit* lies for it, and the defendant hath his remedy for not delivering the reſidue, for this being a contract *executory* on both ſides, each hath remedy on the other, for the non-performance.

(h.) Of evidence againſt a father, as to articles provided for a child.

1 Keb. 439. Tri. per Pais, 400.

It is good evidence againſt a father that phyſic was delivered to his daughter on his requeſt, for that was the conſideration on which the party did deliver the phyſic.

(i.) Of a promiſe of marriage.

G. L. E. 103. Tri. per Pais, 401. Hill v. Chaplin. Paſch. 1658. B. R.

A promiſe to marry *B.* within three months, and after there is another promiſe to marry her within a fortnight, this does not diſcharge the firſt promiſe; but if it had been a promiſe to marry her within half a year, it would have diſcharged the firſt promiſe; for by taking a later promiſe of longer time, the parties muſt be ſuppoſed to intend a diſcharge of the former, or otherwiſe the latter promiſe could have no manner of intent at all.

In the above caſe it would be prudent to declare upon both promiſes, as probably one might, and the other might not be proved.

[4.] Of *non assumpsit, et non accrevit infra sex annos.*

EACH of these issues is founded on the *Stat.* 21 *Jac.* 1. *c.* 16. and lies in all actions upon the *case*; and the reason of the statute is, because a debt must be supposed to be paid, if the action be not brought within that time: for witnesses may die or change their abode, so that it may be a very hard thing to prove the payment of the debt; and since the *law-wager* is avoided, by suing in *assumpsit*, it was thought convenient to limit a time, in which, if the debt was not demanded, payment should be supposed. G. L. E. 179.

This issue doth not lie between merchant and merchant, in case of merchants accounts, for they may have occasion to trust each other for a much longer time, and therefore these persons are excepted by the statute. G. L. E. 180.

N. B. The exception in the statute goes only to actions of *account*, for accounts current; not to stated accounts *per Morton*, 2 *Saund.* 127. *per Twisden*, 1 *Mod.* 71.

This plea is pleaded by way of *bar* to the action, and the form is, that the defendant *comes and defends the wrong and injury when, &c. and says, that the plaintiff ought not to have his aforesaid action thereof maintained against him the defendant, because he says that he did not undertake or promise at any time within six years next before the day of exhibiting the bill, (or suing forth the original writ) against him the defendant in manner and form* Modus intrandi 28, 29. Lib. Placitandi, 61.

as the plaintiff hath above complained against him the defendant; and this he is ready to verify, &c. Or, *That the several causes of action aforesaid, did not, nor did any or either of them accrue * to the plaintiff at any time within six years, &c.*

* This is the proper form where it is debitum in præsenti, solvendum in futuro, as in case of a bill of exchange, &c. payable at a time subsequent to the date.

The reason why it is in bar is, that it exhibits a statute law to the court, in discharge of the plaintiff's demand.

G. L. E. 180. Tri. per Pais, 371. On the issue of *non assumpsit infra sex annos*, the plaintiff proved a debt of nine pounds ten years before, an acknowledgment of the debt within six years, and an offer to pay five pounds for the whole; the plaintiff was nonsuited, for the acknowledgment of the debt is no more than he does by his plea; 2 Vent. 151. but there must be a new promise within six years to maintain the action; and here the promise or offer to pay five pounds does not give an action for the nine pounds. *Sed qu.?* and *vide infra.*

2 Vent. 152. 1 L. Raym. 422. Carth. 471. 6 Mod. 310. 5 Mod. 426, and 2 Show. 126. But the confession of the debt within the time is evidence of a new promise (though it is not of itself a new promise) if found by special verdict, for that may be evidence of a new promise to a jury, to induce them to believe there was such a promise, which when specially found to the court will not amount to a promise in express words.

Kitchart and Standish, per Holt. Mich. Term. 8 W. 3. Carth. 471. 5 Mod. 425. V. 2 L. Raym. 1101. Declaration in *assumpsit* by an executor for monies due to his testator, and the *assumpsit* part is laid to the testator in his life time, on *non assumpsit infra sex annos*, an *assumpsit* was proved to the testator eight years before, and the promise renewed to the executor within the six years, and allowed to maintain

tain the issue, though the *assumpsit* in the declaration was laid to the testator only; for the *assumpsit* to the executor, the representative of the testator, is tantamount to an *assumpsit* to the testator himself, and maintains the issue.

An indebitatus assumpsit against four, they plead *non assumpser' infra sex annos*, and the evidence is, that they all assumed out of the compass of the six years, and that one assumed within the six years, and the verdict found that one did assume, and disallowed; for he must sue them all, else he would vary from his original contract, and as he cannot prove they all assumed within six years, consequently he cannot prove the contract put in issue. 2 Vent. 151. R. per 3 J. Vent. cont.

This plea will not avail, if the defendant promise within six years, though it be without a new consideration; or if he acknowlege the debt within six years, it is evidence, though not conclusive; or if he say, *Prove it due, and I will pay you.* R. per 10 J. H. 10 W. 3. Semb. 2 Vent. 172. 5 Mod. 426. Carth. 471. Sal. 29. 1 L. Ray. 389, 421.

This cannot be pleaded after money is paid into court. Mead v. Wyndham, Bunb. 100.

The *Stat.* of limitations may be replied to a plea of sett-off. Remington v. Stevens. Stra. 1271.

To a plea of the statute plaintiff may reply he or she was an infant, *covert*, &c. when the cause of action incurred, and sued within six years after full age, &c. Lut. 243. R. 2 Saund. 120. 1 Sid. 453.

Though the six years elapse during the nonage, an infant may sue afterwards during his infancy, without waiting till his age. R. 2 Sand. 120, 121.

The plaintiff may reply that the defendant was out of the realm. 4 An. c. 16.

The plaintiff may say he purchased another original, upon which the defendant was outlawed, Cro. Car. 294. Jon. 312.

lawed, and afterwards the outlawry was avoided, and he sued within a year.

1 Com. Dig. 167. The plaintiff may reply that he heretofore obtained a judgment, and that it was reversed, and he now sues within a year after the reversal, or that he obtained a verdict, *&c.*

R. Lut. 264. V. Sal. 425. So, another action commenced by his testator who died. *Sed qu.?*

R. Sal. 424. Or, commenced in an inferior court, which was removed by *habeas corpus*.

Lut. 260. 2 Mod Intr. 140. 1 Sid. 53. Or, that he sued another original, which was returned and continued, and that within six years before that original the defendant promised. Or, that the plaintiff sued a *latitat*, (or bill of *Middlesex*) which was continued, and was to the intent that the plaintiff might declare upon it for the same cause, *&c.*

Sal. 421.

Carth. 144. Or, a writ of privilege continued.

The plaintiff may reply generally that the defendant undertook, or the cause of action accrued (according to the plea,) within six years.

II. Or

II. Of the second Sort of General Issues.

THE ſecond ſort of general iſſues are thoſe which ariſe in actions that ſuppoſe ſome miſdeeds, as the civilians call them, *actiones quæ oriuntur ex malitiâ.* G. L. E. 209.

We ſhall begin with the iſſue of *not guilty,* which is the moſt general of all others, and runs through many ſorts of actions, with a great deal of variety.

(I.) *In* Civil Matters.

(II.) *In* Criminal Proceedings.

(I.) *In* Civil Matters.

We ſhall firſt treat of

[1.] *Not guilty* in *Ejectment,* and

(1.) Of the *Leſſor.*

(2.) Of the *Leſſee.*

(3.) Of *Entry* and *Ouſter.*

(4.) Of the *Leſſor* of the Plaintiff's *title.*

Firſt, Of the *Leſſor.*

Here it is to be obſerved, that on this iſſue the evidence muſt relate to the ſame leſſor, as is named in the allegation, for if it appears by the proof, that the ſame perſon did not, or could not transfer that intereſt Leſſor.

which the declaration alledges to have been transferred by him, the plaintiff doth not prove his declaration; for courts of justice must go *secundum allegata & probata*; if therefore a person doth not by his proofs maintain the matter he hath alledged to the court, he must fail of the justice he demands upon those allegations; and with this agrees the rule of the civil law, *quod probationes sint conformes libello*.

B. N. P. 107. Cro. Jac. 166.

If there are several lessors, and you lay in the declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole; and therefore if any of the lessors have not a legal interest in the whole premisses, he cannot in law be said to demise them, for it is only his conformation where

6 Co. 14. b.

he is not concerned in interest: so if the plaintiff were to declare upon a lease made by *A.* and *B.* and it were to appear upon the trial, that *A.* was tenant for life, remainder to

1 Sho. 342. Morris and Barrow. Hil. 10 G. 2.

B. in fee, it would be bad; So if *A.* and *B.* were tenants in common; but it would be otherwise if they were jointenants, and the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several, and consequently each of them cannot demise the whole. But jointenants are seised *per me et per tout*, and therefore each may be said to demise the whole; and coparceners stand upon the same

1 Ray. 726. Lit. Sect. 316. Law of Ejectments, 86.

foundation. Therefore there ought to be a different count on the demise of each tenant in common, or they may join in a lease to a third person, and that lessee make a lease to try the title.

Qu. de hoc. et vide infra.

G. L. E. [illegible] [illegible] Hil. [illegible]

If a man declares of a *joint* lease, and gives in evidence the lease of *tenant for life*,

and

and of him in *reversion*, this is no proof of the declaration, for during the life of tenant for life, it is his lease of the whole lands, and therefore this is not proof of the demise alledged in the declaration.

Per Treby. Co. Lit. 42. 6 Co. 14. b. Poph. 37. 1 Jon. 305. 2 Jon. 137. 1 Rol. Rep. 299. Raym. 142.

If a man declares of a *joint* lease, and upon the evidence it appears, that *A. B.* and *C.* were *joint tenants* for years, and that *C.* let his part to *A.* and *A.* and *B.* made a lease to the plaintiff, it seems that this evidence doth not answer the matter alledged in the declaration, because as to a third part of the land *A. is tenant in common.*

G. L. E. 210. Cro. Jac. 83. 166. Tri. per pais, 422. In the case in Cro. Jac. the court was divided in opinion, two and two, therefore it was adjourned. Sed vide supra. Cro. Jac. 83.

The best way in all these cases, where it is any way doubtful, is to make a joint lease, and for the lessee to enter and make a second lease, and then to declare on the second lease generally.

I know that this doctrine is laid down in more books than one, and that of authority, yet I have my doubts, for how can the first lessors, make a good title to the first lessee, any more than to a lessor of a plaintiff in ejectment; unless the actual entry and possession of the first lessee can be said to cure the objection? *Vide supra*, the second clause, under this subdivision, where the proper mode is pointed out.

A man declares of a *joint* lease by *Baron* and *Feme*, and gives in evidence a *joint* lease made and delivered by them on the land; this maintains the declaration, for the wife may make a lease of her own land during the coverture, and this is not void, but voidable only; for though the wife's contract be void during the coverture, to bind the personal estate of the husband in which she hath no property,

Cro. Ja. 417, 617. V. Tri. per Pais, 423.

property, yet to bind her own land in which ſhe hath a property, continuing during the coverture, her contract is not void, but voidable, and if the contract ſtand 'till after the coverture, ſhe may if ſhe pleaſes confirm it.

Cro. Jac. 617. 1 Bendl. 134. 3 Co. 35 b. 2 Saund. 213.

If a man declares of a *joint* leaſe by *Baron* and *Feme*, and gives in evidence a joint leaſe delivered by warrant of attorney on the lands, this will not maintain the declaration; for though the wife herſelf may do any act relating to her eſtate, yet ſhe cannot conſtitute an attorney to do it, and therefore his entry and delivery of the leaſe, by virtue of a warrant of attorney from the wife is wholly void, for ſhe cannot put any perſon in her place to tranſact for her, ſhe having already devolved all authority upon her huſband.

G. L. E. 212. Moor. 682. 2 Keb. 700. Tri. per Pais, 422. Contra. 1 L. Raym. 726. which denies this caſe to be law.

If there be ſeveral co-heirs, they muſt make ſeveral leaſes to try their title, becauſe when they demiſe, their leaſes operate according to their ſeveral intereſts, and the leſſee enjoys, from each ſeveral perſon according to his ſeveral intereſt, and therefore if he ſhould declare in ſuch caſe, that the coheirs *demiſerunt* ſo many acres as the whole contains, he would fail in his proof, for each of them demiſes according to his own ſhare only; and therefore the ſafeſt method is, where their ſeveral parts are unknown, to join in a demiſe of the whole, and for the leſſee to enter and demiſe over, and to try the title in ejectment by a general declaration on the ſecond leaſe.

Vide obſervation ſupra.

SECONDLY *of the Lessee.*

THE lease proved, must agree with the lease alledged in the commencement of the term, in the land; and in the number of acres *, for if it be otherwise, it appears to be another contract respecting things, which are not the same, as they materially differ; and if there be not the same term, the same and the same quantity of land, it is a material difference. G. L. 212. Lease.

* The quantity of land is not, the locality is, material.

According to the modern practice, the lease being a fiction, it is confessed by the rule into which the defendant enters. The principal thing to be proved is, the title of the lessor of the plaintiff, at the time of the demise alledged in the declaration. The preceding part and the subsequent matter is stated to shew what the common law and practice were formerly.

As to the *commencement* of the term, if a man declares of a lease made the 30th of March, the eleventh year of the King, to hold from the Feast of the Annunciation next before, for the space of a year, and he gives in evidence a lease made and sealed the 25th *March*, for one year from thence next ensuing, this will not maintain his declaration, the lease which is alledged differing in commencement from the lease that is proved; for the lease alledged, begins *from the Feast* of the Annunciation, so that the 25th of *March* itself is *excluded*; but the lease proved is a lease made the 25th of *March*, for one year *from*

Hob. 73. Moor. 863. 1 Brownl. 77.

Vide observation supra.

Such variance in an action of covenant might be fatal.

fter thence next ensuing, so that here the 25th *of March*, or Feast of the Annunciation is included.

4 Co. 71. b. For when a man passes an *interest from the date*, or *from thenceforth*, which is all one, the interest passes *immediately*, for date either

Date what. signifies the immediate act or minute of delivery, or else the day or time of the delivery; and when an interest passes from the date, it is more for the advantage of the grantee, that the date should be reckoned the very act or minute of delivery; for to pass a present interest, from the date or immediate delivery, is more for his advantage, than that it should begin to-morrow; but these words from the *day* of the date, will never admit of such a construction, that the interest should pass from the immediate delivery, before the day is ended.

But where the date is only a point of computation, and the interest doth not begin from thence, these words, *from the date*, *thenceforth*, and from the day of the *date*, are all one; and therefore if a man declare of a lease made the 12th *December*, to begin from the day of the date, and upon *Not Guilty*, he gives in evidence, a lease made the first of *December*, *Habendum* from thenceforth, and delivered the 12th of *December*, this will maintain the declaration; for where the lease is delivered the 12th of *December*, and could not begin in interest 'till the delivery, the date is only a point from whence the computation of the term begins, and it is more for the interest of the lessee, that it should be excluded out of the term, because he could have no advantage by including it, his interest not being then begun, and there-

fore

fore it is not for his advantage to include it, as the term would end so much sooner, than it would on the other construction; and this has been held always a rule, that when a word is capable of two senses, that sense should be taken that makes most strongly against the grantor, and most for the advantage of the grantee; and this we take to be a very certain maxim in the construction of deeds, for no man can be intended to injure himself by the extent of his own donation; G. l. [illegible] 14. the rules of self preservation do sufficiently defend men from any wrong to their own interest; it is therefore fit that the laws of civil society should provide for the interest of the grantee, that he may not be wronged by a too narrow construction, and consequently the most beneficial must always take place; besides, this rule is farther conformable to justice; as it avoids all manner of deceit in grants, and puts a full end to all controversies about them; for without this rule, men would always affect intricate words, and so every grant would be subject to be overthrown, or at least shaken by debates about its meaning.

A man declares of a lease made the 5th of *May*, in the tenth year of the King, *Habendum* from the feast of the Annunciation last past, for twenty-one years from thence next ensuing, and the jury found a lease made the 5th of *May*, in the tenth year of the King, *Habendum* from the feast of the Annunciation then last past, for twenty-one years next following the date of the said indenture; the lease found by the jury is the same with the lease alledged, for both are from the feast of the Annunciation then last past, for twenty-one years, and they are both expresly for twenty-one years and

V. Hob. [illegible] Moor and Mulgrave. V. [illegible] per P. 42.

and no more, ſo that theſe words, *next following the date of the ſaid indenture*, are utterly repugnant and void.

4 Leon. 14. 5 Co. 4, 5. Tri. per Pais, 426, 427. Here a leaſe duly executed and delivered on the 13th, ſupports the allegation, as to the day following the date in this inſtance not being material, ſed qu. ſuppoſing it vice verſa.

In ſome caſes the date is not a material part of the deed, and therefore if a man declares of a leaſe dated the 14th of *December*, to begin from *Chriſtmas* laſt, for three years, and he gives in evidence a leaſe dated, ſealed and delivered the 13th of *December*, to begin from *Chriſtmas* laſt, for three years, this leaſe in the ſubſtantial part of it being the ſame, *viz.* in commencement, and in the quantity of the lands, though it differ in the circumſtantial and immaterial part of the contract, yet it is good evidence to maintain the leaſe alledged; for thoſe things are the ſame that do not materially differ.

Alſo the declaration ſays, that *J. S.* the 14th of *December* demiſed, which is the matter of ſubſtance in ſetting out the demiſe, and that is proved to be true by the evidence offered, for if he demiſed it the 13th it continued demiſed the 14th alſo.

Ha. ſup. Lev. 6.

But if a bond be alledged to be *dated* the *ſecond* of *Auguſt*, and the party gives in evidence a bond dated the *firſt* of *Auguſt*, this ſeems not to maintain the iſſue, becauſe though the bond be the ſame in all circumſtances but that of the date only, yet they might have been different contracts, for a man may oblige himſelf in twenty pounds one day, and in another twenty pounds another day, to the ſame perſon; *ergo primâ facie*, if the dates do not agree, without more evidence, the plaintiff fails in his iſſue; ſo that if a man declares of a bond dated the *ſecond* of *Auguſt*, and the jury find a bond dated the *firſt* of *Auguſt*, the court, that are not judges of probability and im-

improbability, and who cannot intend a bond to be delivered before its date, cannot adjudge them to be the ſame; and this is not like the caſe of leaſes, for if leaſes agree in all other circumſtances but the date only, they paſs the ſame lands, for the ſame term, and are therefore in effect the ſame; but two bonds may agree in all things but the date, and be two diſtinct bonds, ſince they may be for two diſtinct twenty pounds; and therefore without an identity of date, they are not *primâ facie* evidence of one another.

If a man declares of a bond made the 1ſt of *Auguſt*, and upon the profert it appears to be a bond dated the 2d of *Auguſt*, upon *demurrer* the court cannot adjudge them to be the ſame, for the court in ſuch caſe, is not to intend any thing relating to the *fact* but what appears, inaſmuch as they are not judges of the probability and improbability, but the jury only. Courts of law cannot adjudge ſuch contracts to be the ſame which differ in appearance, for that were to take upon themſelves a judgment of the fact, which they cannot do, and therefore they muſt adjudge them to be as ſet forth, and ſo they are different contracts.

21 E. 4. 38. V. 1 Ld. Raym. 335. 2 Salk. 463.

But if after *oyer* of the bond, the defendant pleads *non eſt factum*, and the jury find that it is his deed, the court will intend the bond dated the 1ſt of *Auguſt*, was delivered the 2d of *Auguſt* in ſupport of the right, for a deed might be *dated* and *ſealed* one day, and *delivered* afterwards on another, and ſo the declaration be good of a bond made the 2d of *Auguſt*.

V Hob. 249. Thorp v. Taylor. Plowd. 393. 2 Co 5. a. 3 Du. Ab. 693. 5 Mod. 281

But

Ha. sup. Lit. 6.

But if the bond be alledged as made the 1st of *August*, and upon the *oyer* it appears to be dated the 2d of *August*, it seems that after the deed is found, this will be a good objection in arrest of judgment, for the bond cannot be intended to be *delivered* before its date, for the date is the time of sealing, and it cannot be delivered as a deed before it has the essentials of a deed, by the seal of the party; and so it cannot be helped by the verdict.

2 Co. 4, 5. Goddard's case. Cro. Jac. 136. Cro. Car. 77. 2 Rol. Abr. 6, 7.

But if a bond is alledged to be dated the 1st of *August*, and so it appeared to be upon the *oyer*, yet if the jury find that this bond dated 1st of *August*, was in reality sealed and delivered any other day, it is well enough, for the date is not a material part of the contract, and if the contract offered to the court was sealed and delivered at another time, yet it is the deed of the party. *Vide supra.*

G. L. E. 218. Commencement of Leases.

Having thus considered the dates, we return again to the *commencement* of leases.

A lease of one commencement cannot be proved by a lease of another; but where a man alledges a lease to answer some special purpose, and the jury find a lease of another commencement, yet if the lease be sufficient to answer that purpose, he shall prevail.

Hob. 73.

As if in *replevin* the defendant avows for taking plaintiff's beasts in his common *damage feasant*; plaintiff replies that *J. S.* was seised of an house and lands to which he had common, and demised the same to the plaintiff the 30th of *March*; the avowant traverses the demise *modo & forma*, and the jury find a lease the 25th of *March*, from *J. S.* this is well enough, and judgment shall be given for the plaintiff; for the jury find enough

upon the whole matter, to assert the plaintiff's right of common; so that their verdict, although different from what is alledged, yet is sufficient to support the plaintiff's right of common; for notwithstanding they do not find the allegation itself, yet they find what will answer the purpose of the allegation, and that sufficeth.

But if they had found a lease by *J. N.* they had not found enough to answer the intent of the allegation, nor to direct the judgment of the court; for the defendant admits by his rejoinder that *J. S.* was seised of an house and lands, and had a right of common, in as much as he only denies the *demise to the plaintiff*; but possibly, had the plaintiff alledged seisin of such a house and lands in *J. N.* to which common was appendant, the defendant would have traversed the seisin of *J. N.* or the appendancy of the common: so that the finding of the lease of *J. N.* would not on the whole matter answer the plaintiff's purpose, because the defendant doth not admit the seisin of *J. N.* nor the appendancy of the common to his house, consequently upon such a finding of the jury, the court would not adjudge the plaintiff's beasts to be returned. Hob.

If a man declare of a *parol* lease, and give in evidence a lease by *indenture*, this will not maintain the declaration; for all contracts that are executed with solemnity, ought first to be offered to the court, (who are the proper judges of all things that belong to the effect of such contract,) before they can be given in evidence to the jury, to judge of the *fact*, whether such a contract was really executed. Plowd. Com. 4[illegible].

G. L. E. 220. [illegible] 1 Sid. 432. 2 Vent. 174.

Declaration in ejectment of *Michaelmas* term, which relates to the first day of term, and the lease declared on bears date some time after the first day of term, yet if it appears by evidence that the bill was filed after the first day, it is sufficient, for the act of law shall not do any man an injury, and therefore the relation of bills to the first day of the term, cannot obtain in this case, for then it would delay a man's remedy, and he who was ejected after the first day of term could not complain 'till the term was over.

I conceive that this is not law, for he might intitle his bill or declaration of a day subsequent to the ejectment.

In modern practice, a declaration in ejectment is delivered before the essoign day of the term, in or after which the cause is meant to be tried. The declaration is of the precedent term, but if the tenant appears, the issue is made up of the subsequent term, and then the matter stands right upon the record.

Cro. El. 13. Vel. 166. Owen. 133. 1 Browel. 145.

In ejectment a man declared on a lease for one hundred acres, and gave in evidence an ejectment out of forty acres; this was held to be good for the forty acres; because the jury find an injury relating to the same land as in the declaration, though that land was not of the same extent as alledged; but it appeared that it was the same land which was let to the plaintiff, and the defendant did him an injury by his ejectment.

As to abuttals and boundaries, they are not now stated in declarations in ejectment. It is sufficient to declare of a demise of so many acres, lying in such a parish and county. The quantity is not material, so that sufficient be laid.

If

If a man declares of a leaſe of ſo many acres of meadow and ſo many acres of paſture, and gives in evidence a demiſe of the herbage and pannage of ſo many acres, this will not maintain the iſſue, for the contract which he alledges is for the whole profits of the ſoil, and therefore the contract ought to be brought for ſo many acres of herbage, *&c.* for which an ejectment lies; for when a man hath the whole eſtate, and lets part of it, the leſſee muſt declare upon the contract as it is, and not of another. Hard. 330.

But if a man hath the inheritance in the graſs, or in *prima tonſura*, and lets this to another for years, and the leaſe imports a leaſe of the lands, the leſſee may declare upon ſuch leaſe, and give this title of his leſſor in evidence, for he that hath the firſt graſs, or *prima tonſura*, hath the moſt eſſential profits, and therefore he is reputed to have the freehold; and he that hath the after-graſs hath only a profit apprender out of theſe lands, in the nature of a common; and therefore, when he that hath the firſt graſs lets the lands by the name of the firſt crop of the lands, he hath done according to his power, in as much as he had the very property in the lands themſelves, and then his leſſee muſt declare according to the contract, which is on a leaſe of the lands themſelves. But where any perſon hath the lands, and lets the herbage, there the leſſee muſt declare according to the contract, otherwiſe he will fail in his proof. Cro. Car. 362. 1 Inſt. 4.

If a man declares of a leaſe generally, and gives in evidence a leaſe made by a copyholder, or by a guardian to an infant, this is well enough, for ſuch leaſe is good againſt every perſon but him that hath right, as all Cro. El. 6-6. Hard. 330.

other possession is; so the lease is maintainable against every person, but the lord or the infant.

Dyer, 32. In debt, if a man declares of a lease of twenty-six acres of land, and he gives in evidence, and the jury find, a lease of twenty acres of land, this will not maintain the declaration; for if the number of acres are not the same, it is not in substance the same with the lease alledged, and therefore the party hath failed in his allegation.

Dyer, 32. But if a man declare on a lease for twenty-six acres, and the defendant says that he let these twenty-six acres of land, and four more, and concludes with a traverse, *absque hoc*, that he let twenty-six acres of land only, and the jury find twenty acres, this, by the better opinions, is found for the plaintiff, for the jury are only to try the matter in debate, and not any point in which the parties are agreed; now they both agree that there were twenty-six acres demised, and consequently when the jury find there were but twenty, they find for the plaintiff, in as much as they have not found more than the defendant hath admitted, which was the matter in question.

Dalison, 105. If a man declare of a lease dated the 28th of *January*, and it be found sealed the 29th of *January*, and the plaintiff be found to be *ejected* the 30th, this is well enough, as long as it appears that the plaintiff was ejected after the lease made; otherwise it is if the *ejectment* had been laid the 28th.

Plowd. Com. 85, 86. If a man declares for a messuage and eleven acres of land thereunto appertaining, though the words, *thereunto appertaining*, be void, in as much as lands cannot appertain to a messuage, yet since in common speech the lands let with a messuage are said to appertain to it,

it is matter of evidence to prove what eleven acres are intended; and if a man has two manors called *Dale*, and levies a fine of one of them, he may prove by circumstances which of the manors he intended.

' *The preceding law may be of use on various occasions, even in* ejectment, *as in the case of corporations, &c.*

THIRDLY - Of *Entry* and *Ouster*.

FORMERLY there used to be an actual *entry* and *ouster*; now by rule of court the defendants confess *lease*, *entry* and *ouster*, and insist on nothing but the title.

G. L. E 224. Oates Hill. Ass. 1700. Per Treby. 1 Vent. 42, 248, 332. Salk. 250.

But the confession of *entry* doth not extend to a case where it is necessary to prove an *entry* to make a title in the *lessor* of the plaintiff, for the rule is to confess *entry* of the *lessee*, and not of the *lessor*; and the rule is intended more conveniently to try the title of the *lessor*, and not with any design to make any part of *his* title. *Vide infra.*

1 Vent 332. 2 Str. 1086.

And therefore where an entry is necessary to take advantage of a condition broken,* or to avoid a fine, there the *lessor* must make an actual entry.

* Qu. As to condition broken, I conceive the common rule renders an actual entry unnecessary.

G. L. E. 224. Oates Hil. Ass. 1700. per Treby. 1 Sid. 223. 2 Lev. 750. 1 Salk. 5[illegible].

Plaintiff made a title by lease of five thousand years sealed and delivered at *London*, and the defendant insisted on the proof of entry by virtue of that lease, but the court presumed an entry, unless the contrary was shewn on the other side; *Sed quær.* for it seems to be incumbent on the plaintiff to prove whatever is necessary to give him a title, and the having a lease seems to be no presumption that the party entered by force of that lease.

But qu. In ejectment if the rule does not supply proof of entry?

Vaugh. 196, 7, 8. Latch. 62. 1 Jones, 321, 327. Cro. Car 301. 1 Sid. 91.

A man may make a lease of tithes to try his title in ejectment, but if he bring an ejectment for the *rectory*, and gives the taking of the tithes in evidence, this doth not maintain the declaration; it not being an ejectment

ejectment out of the *rectory*, for the *tithe* is an incorporeal inheritance collateral to the *rectory*, and no parcel of it, because the *rectory* is the church and glebe, of which the parson, by his *induction* is seised; and therefore the plaintiff must prove an entry into the *glebe* in this ejectment, for it continues a rectory, though the parson had aliened all his *tithes* during his life.

If a man makes a lease to begin a *die datus*, he cannot prove his entry at the day when the lease was made, for that were a disseisin, in as much as the day itself is not included. G. L. E. 225. Tri. per Pais, 390. 1 Str. 55

If a man makes a general entry into part, this is sufficient to vest the whole estate; as if an ancestor die, and the estate descend to the heir, the entry into part is sufficient to vest the whole estate, though he doth not say he entered in the name of the whole, for the presumption of law is always in favour of the possessor until the contrary can appear. Co. Lit. 15. 6.

Now the ancestor dying, the possession is cast upon the heir, to preserve a tenant to the *præcipe*, and since he is by the law reputed the possessor, his general act of entry without more saying, must be taken in favour of possession, as an act with intention to possess the whole; I say this is *prima facie* a construction of that act, unless the contrary appear, that is, unless by any words he makes it a special entry; as if he says, he enters into that acre only, for the act is to be interpreted according to the mind of the party from whom it proceeds.

But where a man enters to devest an estate, there his entry must be special, for he must enter into some one acre, in the name of the whole; and this is upon the same reason, as the presumption of law is still in favour of Co. Lit. 15. b.

the possessor, unless the contrary shall appear; for if a man, in such case, enters generally into one acre, without saying in the name of rest, he shall not be intended to defeat any more than that acre on which he entered; for since his adversary is possessed of the rest, the law will not intend the claim of the possession any farther than the words of him that made such claim.

But this presumption stands only 'till the contrary appears; for if by express words he shewed an intention to claim the whole, and set up a right to it, then cannot a naked possession withstand that claim which plainly appears to destroy it.

Co. Lit. 252. b. Where the seisin is the same, there one entry only in the name of the whole sufficeth; for by the act of entry it plainly appears, that the party intended to defeat the whole possession.

G. L. E. 227. If a man disseises another of one acre, and at another time of another, the party that hath a right, may enter into one in the name of the whole, for the possession is the same, and there is the same person to defend it.

Ibid. But where the seisin is different, there the entry must be distinct in both acres, and he cannot enter into one in the name of both; for let my intention be what it will, what defeats one man's estate, will never defeat another's; for no man's possession can be defeated by an act which doth not relate to the possession; and where the possession and seisin are distinct, the act which defeats another man's seisin has no relation to mine; for I am not concerned to know nor defend it.

Co. Lit. 252. b. Hetch. 71. Therefore if a man disseises another of two acres of land, and makes a lease for life of one

acre,

acre, and the like of the other, the diſſeiſſee muſt make different entries; becauſe two tenants for life have two diſtinct ſeiſins of their eſtates for life, which they are both diſtinctly to defend.

But if he had let it to two perſons for years, the poſſeſſion of the tenants for years is the poſſeſſion of the diſſeiſor, and they are only looked upon as his bailiffs to keep poſſeſſion for him, and upon him reſts the defence of the intire poſſeſſion; and therefore the law reckons one entry in the name of them both, to be ſufficient, becauſe the poſſeſſion and ſeiſin of the freehold is united in the diſſeiſor. Co. Lit. a 52.

If a man enters to another purpoſe, as to deliver a leaſe upon the land, this is no entry to defeat the poſſeſſion of the diſſeiſor, for a man's intention is to be regarded, and that gives the ſignification and value to the action, and without an intent appearing to defeat the poſſeſſion, this is as no entry at all. Co. Lit. 49. b. Plowd. 92, 93.

If there be a diſſeiſin of two acres in two different counties, at the ſame time, there muſt be diſtinct entries; for the ſolemnity of entry is required for the ſake of the country, that it may be known in whom the poſſeſſion is; beſides, as all counties met in diſtinct bodies in their proper county courts, where the eſtate was in different counties, the entries for their notice was ordained to be ſeveral. G. L. E. 228.

If a thing begin without ſolemnity, it may be defeated without entry, for it requires no more notoriety to defeat the poſſeſſion, than it did to begin it; and therefore if a leaſe for years, upon non-payment of rent were to be void, the eſtate is in the leſſor without any entry, becauſe it began without any ſolemnity; Co. Lit. 214, 215. Plowd. 133 b.

nity; but if a leaſe for life, upon non-payment of rent, were to be void, yet it cannot be avoided without entry, becauſe it began with *livery*; but if the condition of a leaſe for years were, that upon non-payment of rent, the leſſor ſhould re-enter, there, by the expreſs words of the contract, there muſt be an entry.

G. L. E. 229.

This was formerly ſo, but now, upon an ejectment, it is conceived that the rule confeſſing entry, ſupplies the want of actual entry.

Co. Lit. 252. b.

If a man make ſeveral conditions annexed to ſeveral feoffments of two ſeveral acres of land, and both conditions are broken, he muſt make ſeveral entries into each acre, and cannot enter into one in the name of both; becauſe the ceremony of *livery* was diſtinct, by which notice was given, that poſſeſſion did begin in the feoffee, and the force of that ceremony continues 'till defeated, by an act of the ſame notoriety; and the defeating of one ceremony quite diſtinct from the other, can be no notice that the other is alſo deſtroyed and defeated, and therefore the entry muſt be different.

In all theſe caſes, if ejectment be brought, upon condition broken, the rule confeſſing entry and ouſter muſt ſurely be ſufficient. Vide infra. But yet the law of entries here laid down is very neceſſary to be known, eſpecially where a fine hath been levied.

G. L. E. 229. cites Trin. Aſſ. 1700. per Nevil.

If *J. S.* is a truſtee of a leaſe for *J. N.* and is diſpoſſeſſed, and a ſtranger enters in the name, and by the direction of *J. N.* this is not the entry of *J. S.* the truſtee, becauſe not made in his name, nor by the direction of him who had the legal eſtate; and an entry that defeats poſſeſſion, is to be taken according to the ſtrict letter of the law, and by the common law *J. N.* had not the right of the term, but *J. S.* only.

Oates on the dim of Wigfall v. Bridon, E.

The preceding doctrine of *entry*, may upon various occaſions be of uſe, but as to *ejectments*, the

the confession (by the rule) of lease, *entry* and *ouster*, is sufficient in all cases, except in the case of a fine * with proclamations, in which case it is necessary to prove an actual entry. 6 G. 3. B. N. P. 103. 3 Burr. 1895.

* Jenkin v. Prichard. C. B. M. 30 G. 2. B. N. P. 103.

Note, The plaintiff must not lay his demise antecedent to his entry. Stra. 1086. v. 4 Ann. c. 16. § 16.

Though the defendant confess lease, entry, and ouster, yet he may deny that he is in possession of the premisses for which the plaintiff goes, and put the plaintiff upon proving it; and if he cannot, he will be non-suited. Smith & Mann. T. 21 G. 2. Wilf. 220. on a case reserved, B. N. P. 110.

And in case the landlord hath been made defendant, instead of his tenants, the plaintiff must prove the tenants in possession, for the defendant does not, by entering into the rule, confess himself to be landlord of any premisses, but of such as were in the possession of those tenants. However, it has been said, that if there be but one defendant as tenant in possession, the plaintiff need not prove him in possession, because if he be not, why did he enter into the rule. Ibid. Doe ex dim. Jeffe v. Bacchus. M. 30. G. 2. K. B. at Sittings. B. N. P. 110.

FOURTHLY.

FOURTHLY—Of the *Lessor* of the Plaintiff's *Title*.

G. L. E. 230. WE shall not here speak of all the controversies relating to *title*, for that were an endless work, and would draw in all the doctrine of tenure under this head; but shall here only mention the lesser particularities of title.

G. L. E. 230. Tri. per Pais, 386. If a man issues an *eliget*, and brings an ejectment to try his title, he must shew his *elegit* filed, for that remedy is founded on the choice of the lands, rather than on the body of the debtor, and therefore his choice must appear of record, since from that choice he derives this sort of execution.

G. L. E. 230. If lessee after the commencement of his lease make a lease to another, or assign it over, the second lessee must prove the possession of the first lessee, otherwise he will fail in his issue, for without possession the first lease was a *chose in action*, not transferable over; and the reason why the rule that a *chose in action* should not be transferable, was to avoid the danger of maintenance of great lords, and it was therefore a very politic law, whilst tenures continued in a perpetual subordination one under the other.

G. L. E. 231. Tri. per Pais, 387. 2 Keb. 795. If the trustee of a lease be lessor in ejectment, his disclaimer in *Pais* will avoid the plaintiff's title; for no man can have right against his own disclaiming of right, and the only remedy that *cestui que trust* hath is, by bill in equity to punish the corrupt conscience of the party, who disclaimed a right to the land,

land, when he had taken the truſt and charge of it upon him.

In ejectment the defendant ſhall not give in evidence a former mortgage or conveyance made by himſelf, becauſe he cannot take advantage of one contract that he himſelf has made, thereby to deſtroy another, but in this caſe the party who hath the intereſt, muſt procure himſelf to be made a defendant. G. L. E. 231. Tri. per Pais, 388.

A parſon in ejectment, muſt prove admiſſion, inſtitution, and induction, his ſubſcribing the articles, and declaring a full and free aſſent and conſent to the Common Prayer. G. L. E. 231. Tri. per Pais, 389. 6 Co. 29. b. 1 Sid. 220. B. N. P. 105.

For the plaintiff muſt make out a good title to himſelf, and therefore he muſt not only prove that the living was well filled at firſt, but that it continued full 'till the time of the action brought; for he muſt deduce his right down to the time of bringing the action; and by the ſtatute, unleſs he ſubſcribe the articles, and declare his aſſent, the living becomes *ipſo facto* void, without any ſentence declaratory; ſo that unleſs he proves the doing of the thing required, he doth not prove the living full at the time of the action, and ſo makes no title at all to himſelf.

But after ten or twenty years poſſeſſion, the clergy ſhall not be put to the preciſe proof of theſe ſubſcriptions, for the long poſſeſſion is a preſumption, unleſs the contrary be proved; and all things muſt be ſuppoſed to be well done, unleſs called in queſtion within a reaſonable time.

But if the parſon ſhews admiſſion, inſtitution, and induction, he need not ſhew any right in his patron on the ejectment; for if he fill the church, he hath a title to the glebe 1 Sid. 221. Tri. per Pais, 389. B. N. P. 105.

and the revenues against all men; and the right of the patron must be contended with the patron himself, in a *quare impedit*, or if the time be elapsed, in a writ of right of advowson.

B. N. P. 105. But presentation ought to be proved, and institution would not be of itself sufficient evidence of it, though it were recited in the letters of institution, especially if induction or possession have not followed.

Hob. 72, 166. If on *not guilty* pleaded, the lessor of the plaintiff shew a *feoffment*, the defendant may give *covin* in evidence, but if on *nient en feoffa pas*, the plaintiff shew a *feoffment*, the defendant can never give *covin* in evidence; for in the first case, however the defendant contradicts the title of the plaintiff, as long as he shews that there was no title in the lessor of the plaintiff, it sufficeth; and if the title of the lessor depends upon a *feoffment*, which the defendant shews to be *covinous*, he destroys his title; but when the issue is *feoffment* or no *feoffment*, there the only question is, whether there be that contract, with all the solemnities which the law requires to a *feoffment*, and not whether it were done with a fraudulent intention; for where special issues are taken, no body can run into any point that is out of the issue, to which the parties are unprepared; but on the general issue, whatever tends to falsify the plaintiff's cause of complaint, may be given in evidence. But a feoffment cannot be called absolutely void, which is *covinous*, and therefore *covin* cannot be given in evidence upon the *nient en feoffa pas*, for since notice is given by the *livery*, in whom the freehold is, the act of the *livery* which subserves that purpose, can-

not be reputed absolutely void; and, therefore, it shall never be said, that it is no *feoffment*, because it is a sufficient notice to direct the *præcipe* of a stranger.

But if a man *enfeoffed* by *covin*, to avoid the debts of creditors, pleads that he was seised at the time of the judgment by virtue of a *feoffment*, and the creditor, that he was not seised at the time of the judgment, nor at any time afterwards, on this issue the *covin* may be given in evidence, for this is indeed no *seisin*, by the plain words of the statute, to avoid the extent of the creditors. Hob. 77.

If the heir pleads *riens per descent*, and to shew that there was nothing descended to him, gives in evidence a *feoffment*, the plaintiff may in opposition give *covin* in evidence; for this is to destroy the effect of the *feoffment*, which indeed hath no effect to defend and cover the heir from the actions of his ancestors creditors, by the design of the statute; and the creditor in this case cannot be put to plead it, because he could not foresee any such secret *feoffment*, or know whether the heir would insist on it, 'till offered in evidence, and therefore, that is the proper time to encounter it with proof of the *covin*. G. L. E. 234.

A voluntary conveyance hath no badge of fraud, unless the party were then in debt, or in treaty for a sale of the lands; for a man may have reason to settle for the good of his wife and children, and if he hath a clear estate, and no intention to sell, the settlement must be taken to be a good one, for that cannot lye under a suspicion, where there is no discovery made of an intent to use that settlement to fraudulent purposes, at the time of making it. Style, 446.

Style, 450. If *copies* of *court-rolls* be ſhewn to prove a cuſtomary eſtate, the enjoyment of ſuch eſtate muſt be proved, otherwiſe it is not good; as if the cuſtom was to be proved of entailing copyholds, you muſt not only prove from the rolls, that there were ſuch intails, but alſo an enjoyment under them accordingly, for the rolls only ſhew that ſuch an eſtate was limited, and that the entailing of copyholds was endeavoured at, but this doth not prove an uſage, unleſs the parties continued an undiſturbed poſſeſſion under it; for the words of limitation to a man and to the heirs of his body, make a fee-ſimple conditional at common law, and therefore from the words of the roll, without proof of the uſage, you cannot collect that there was a cuſtom of entailing.

B. N. P. 110. If the defendant prove a title out of the leſſor of the plaintiff, it is ſufficient, though he have no title himſelf; but he ought to prove a ſubſiſting title out of the leſſor; for producing an antient leaſe for 1000 years will not be ſufficient, unleſs he likewiſe prove poſſeſſion under ſuch leaſe within twenty years.

Wilſon and Witherby. 8 Ann. in Kent, per Holt C. J. B. N. P. 110. So if the defendant produce a mortgage deed, where the intereſt hath not been paid, and the mortgagee never entered, it will not be ſufficient to defeat the leſſor, who claims under the mortgager, becauſe it will be preſumed that the money was paid at the day, and conſequently that it is no ſubſiſting title; but if the defendant prove intereſt paid upon ſuch mortgage after the time of redemption, and within twenty years, it will be ſufficient to nonſuit the plaintiff.

Upon

Upon the argument of the caſe of *Lade, Bart.* v. *Holford & al.* Eaſt. 3 G. 3. *B. R.* *Lord Mansfield* declared that he and many of the judges had reſolved never to ſuffer a plaintiff in ejectment to be nonſuited by a term ſtanding out in his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee, but direct the jury to preſume it ſurrendered. B. N. P. 110.

The defendant produced a mortgage for years by deed from the plaintiff's anceſtor, upon which was an indorſement *in hæc verba*, "Received of Mr. M. O. 500 *l.* on the "within recited mortgage; and all intereſt "due to this day; and I do hereby releaſe "to the ſaid M. O. and diſcharge the mort-"gaged premiſſes from the ſaid term of "500 years." On a caſe reſerved the court held, 1. That theſe words amounted to a ſurrender of the term. 2. That ſuch ſurrender might be by note in writing by the ſtatute of frauds. 3. That a note in writing was not required to be ſtamped. Farmer ex dim. Earle v. Rogers & al. T. 1755. C. B. B. N. P. 110.

Qu. As this is a receipt, if ſuch would not now require the common receipt ſtamp under the late act?

But though a ſurrender or an aſſignment of a term may be made by note in writing without ſtamps, yet if it be made by deed under ſeal it muſt be ſtamped.

As in this action more frequently than in any other, the legitimacy of the parties comes in queſtion, it may be proper in this place to take notice, that it is the practice to admit evidence of what the parties have been heard to ſay as to their being or not being married; and with reaſon, for the preſumption ariſing from their cohabitation is either ſtrengthened or weakened by ſuch declara- B. N. P. 111.

 tions,

tions, which are not to be given in evidence directly, but may be aſſigned by the witneſſes as a reaſon for their belief.

Hil. 17 G. 2. B. N. P. 112.

In *May* and *May*, which was tried in *K. B.* at bar, upon an iſſue directed out of Chancery, the preamble of an act of parliament, reciting that the plaintiff's father was not married, and to the truth of which he was proved to have been ſworn, was given in evidence; yet upon proof of a conſtant cohabitation, and his owning the mother upon all other occaſions to be his wife, the plaintiff obtained a verdict.

Vide as to caſes of ſettlement, and orders of baſtardy, B. N. P. 112, 113. As to marriage V. the Stat. 26 *G.* 2. *c.* 33.

Rex v. Preſton, next Travaſham M. 33 G. 2. B. R. B. N. P. 114.

This act does not take away the evidence of preſumption from co-habitation. But if the evidence be clear that the marriage was not celebrated according to the requiſitions of the act, it is totally void, and no declaratory ſentence in the eccleſiaſtical court is neceſſary.

Salk. 120. Pride and Earl of Bath. Co. L. 244.

Note, The rule *quod non eſt juſtum aliquem poſt mortem facere baſtardum*, holds place only in the caſe of baſtard *eigne* and *mulier puiſne*. But if H. marry a woman, and that woman marry again, living H. the laſt marriage is void without any divorce, and the jury ſhall try the fact which proves it not a marriage.

[2.] Of

[2.] Of *Not guilty* in *Trespass, vi et armis*, and on the *case*.

(1.) And *First*, We ought to shew what evidence must, may, or may not be given on the part of the *plaintiff*.

(2.) *Secondly*, What evidence may, or may not be given on the part of the *defendant*.

(a.) *First*, What evidence may be given by the plaintiff to prove his declaration.

IF a man declare in trespass, and assign the trespass in an acre of land, thus butted and bounded, and give evidence of a trespass in half that acre, it is sufficient; for since a man proves the damage to be done within the bounds alledged in the declaration, he proves what is alledged; in as much as the damages only are to be recovered on these allegations; and here he has sufficiently proved that damage which ought to be redressed; for a trespass in any part of the acre, is a trespass in the acre, and so answers the declaration. Cro. Jac. 183, 184. Yelv. 114. Noy. 125, 1 Brownl. 210.

N. B. In trespass it is not customary in the declaration to state abuttals: it may be done in a new assignment, *if the defendant by his plea renders it necessary.*

But if a man declare in ejectment for an acre thus bounded *, and proves title to but half, this is not sufficient, unless he distinguish the premises, nor can any execution be had by delivery of possession of part, unless that Cro. Jac. 183, 184. Yelv. 114.

* In ejectment there is not any occasion for buttals.

 part

part be ascertained, for one part of an acre may be much better and more fruitful than the other.

Cro. Jac. 184. If there be two tenants in common, and one brings an action without the other, the defendant cannot take advantage of this upon the general issue, but he ought to plead it in abatement; for when the plaintiff proves that he had the possession of the soil, and that there was a violation of that possession by the trespass of the defendant, he proves his declaration, for the manner of having or possessing is not called in question in this action; whether he had it with another or by himself alone, it is still *clausum ejus*, and if violated by the defendant, the plaintiff is to be redressed, and it is not incumbent on him to prove any more than what he has alledged, that the close or field was his own, and that a trespass was there committed by the defendant; and this is not like the case in ejectment, where a man declares of a sole demise, and gives in evidence the demise of tenants in common, for there the plaintiff doth not prove the title that he hath alledged in his declaration, and so fails in his evidence; but where one tenant in common brings trespass, he doth not bring his writ in the manner the law requires; for since each have an undivided property in gross, both should have brought their action of trespass for the damage to it; and if the writ be not brought in the manner the law requires, the defendant may plead it in *abatement*.

G. L. E. 237. Tri. per Pais, 409. 2 Str. 820.

1 Leon 83, 84. But if there be two tenants in common, and one brings an action against the other, he may take advantage of it upon the general issue; as in trespass, and *not guilty* pleaded,

ed, the defendant gives in evidence that *Bromley* was seised in fee, and let the premises to the plaintiff, and one *A.* who assigned the same to *B.* by whose command the defendant entered; and this was allowed to be good evidence for the defendant on the general issue, as this disproves the fact alledged in the declaration; for hereby it appears he did not violate the property of the plaintiff, he did not enter into a close that was his alone, but into his own close, or the close of another, by his command.

In trespass for taking down a pew, evidence that the pew was fastened to the pillar of the church with a chain; this is not good evidence to prove the declaration; otherwise it is, if it had been fixed to the pillar by a nail; as in the one case it is not fixed to the freehold, but in the other it is; for whatsoever is fixed to a church or house, is reckoned part of the church or house in which it is fixed; for the church is an house that consists in its frame and building of several distinct materials fixed one in another; whatever therefore is fixed to the house or church, is a part of it; but if it be fixed to another thing that is fixed to the house or church, it may then belong to another, for not being immediately fixed to the frame of the church or house, it cannot be reckoned part of it. G. L. E. 238. Tri. per Pais, 396.

If a man recover in an erroneous judgment, and trespass be committed by a stranger on the land, and after the judgment is reversed by error, yet in trespass brought by the recovetor, he shall give this whole matter in evidence, and maintain his declaration; for though the writ of error destroys the 13 Co. 21, 22.

 judgment

judgment between the parties by relation and fiction of law to advance the right, yet that fiction of law shall not be set up to encourage wrong, and discharge the trespasser, for the whole profits are recovered by the plaintiff in the writ of error against the party that recovered in the judgment, and therefore it is fit that he should punish all trespasses, and not pay for that which he never received.

G. L. E. 239. Clayton 32. Tri. per Pais, 398.

Upon trespass brought against *A.* evidence was given that the hogs which committed the trespass were the property of *B.* and kept in the defendant's yard, (adjoining to the land of the plaintiff) by the servant of *B.* and yet it was allowed that this evidence did maintain the declaration against *A.*

G. L. E. 239. Clayton 33. Tri. per Pais, 398.

So in trespass against *A.* evidence given of agistment of the beasts (that trespassed) taken into the land of *A.* and allowed to maintain the declaration against *A.*

For *A.* in these cases had a special property in the beasts, and it is by reason of that property the trespass is committed, and therefore he is justly answerable for it; for had not the beasts been taken into the defendant's ground, they had never broken into the land adjoining.

1 Sid. 225. 1 Keb. 757. Cro. Jac. 534.

In trespass *Quare clausum & domum fregit & alia enormia ei intulit*, upon the evidence it appeared that an injury was offered to the plaintiff's daughter, and it was allowed that any matter that arose *ex turpi causa* might be given in evidence upon the general declaration of *alia enormia ei intulit*; but any other matter that doth not arise *ex turpi causa* could not be given in evidence on the ge-

4 neral

neral declaration of *alia enormia ei intulit*, but it ought to have been expreſsly ſet forth in the declaration, or elſe nothing could be given in evidence thereunto relating; for it doth not ſeem to agree with modeſty to expreſs the manner of any indecent commerce, but all ſuch things muſt be more properly hid under general words, and therefore may be fitly given in evidence on the *alia enormia ei intulit*. *Sed qu. as to the injury to the plaintiff's daughter?*

If the injury be not expreſsly ſet forth, how can the defendant be prepared for his defence at the trial? Suppoſe an aſſault, the defendant might plead ſon aſſault, *prove it, and be intitled to a verdict, which he could not under the general iſſue.*

If a man declare of treſpaſs in a certain cloſe abuttant * *ſuper quoddam molendin' in tenura J. S.* if the plaintiff do not prove his abuttals, he fails; and, in this caſe, becauſe he could not prove that the mill was in the tenure of *J. S.* the jury being at bar was diſcharged †; for he failed in his proof, becauſe he did not prove it to be the cloſe diſtinguiſhed and deſcribed in the declaration, and ſo it did not appear that there was any treſpaſs in the cloſe deſcribed.

G. L. E. 240. Tri. per Pai., 400. Godolſh. 124, 125.

* Abuttals are in general unneceſſary in treſpaſs, unleſs the plaintiff is, by the defendant's plea, driven to a new aſſignment.

† Plaintiff nonſuited.

If in ejectment the plaintiff declares for a manor, he muſt prove the attornment of the tenants; for a manor conſiſts partly in demeſnes, and partly in ſervices; without ſervices there is no manor, and without attornment there is no ſervice.

3 Mod. 36. Lit. § 553. 1 Rol. Ab. 293. 1 Salk. 90, 91.

In treſpaſs upon the caſe againſt the defendant, for digging an hole in a way, whereby the plaintiff's horſe fell in, to his damage,

Style 335.

 &c.

&c. if he doth not prove the way, and that the defendant dug the hole, he fails in the proof of his declaration.

Co. Lit. 283. a. Cro. Car. 228, 514. 1 Sid. 308. Tri. per Pais, 394.

If trespass were done the 4th of *May*, and the plaintiff alledges the same to be done the 5th of *May*, or the 1st of *May*, when no trespass was done, yet if upon the evidence it appears that the trespass was done *before the action brought*, it sufficeth; for the time of the injury is no more a material part of any injury, than it is of a contract; and therefore whether there is an injury done, or not, is the question; and not *when* it is done; but if there was no injury done at the time of the action brought, then the plaintiff had not any cause of complaint, and so the action at the time it was brought, was wholly groundless.

In action in B. R. tried in Kent a few years since, at the suit of the proprietors of the Gravesend Ferry, against a waterman for infringing their right; it was objected that the plaintiffs had not shewn any cause of action before suing forth their writ, though they proved several facts between that time, and the first day of the term wherein the writ was returnable, and of which term the plaintiffs bill was. *Blackstone, J.* suffered plaintiffs to take a verdict, but reserved the point for the consideration of *B. R.* And upon argument, the court was of opinion the plaintiffs were intitled to recover. In *B. R.* the bill is supposed, for such purposes, to be the commencement of the action.

G. L. E. 241. cites Shelim and Standish, per Holt.

If a man be said to assume the 4th of *May*, and proof be that he was then dead,

3 but

but that he aſſumed on another day, it ſufficeth.

In an action for ſafe carriage, if no price be ſtated, it ſhall be intended for the common price, but if a ſpecial agreement be ſet out to carry for 4*s.* an hundred, ſuch agreement muſt be proved, or that the common rate is to carry for 4*s.* an hundred. G. L. E. 242.

(*b.*) *Secondly*, What Evidence upon *Not Guilty*, may or may not be given on the part of the *Defendant*.

The defendant may prevail in this iſſue,

C. L. E. 242. *FIRST*, by making title to the land, for then he falſifies the declaration, becauſe he proves that he did not enter into the plaintiff's cloſe, but into his own; and conſequently that diſproves the plaintiff's declaration.

5 Co. 116. *Secondly*, by making title to the profits of the land when he hath not a title to the land itſelf, as this alſo falſifies the declaration; for ſuppoſing treſpaſs for treading down the plaintiff's corn, defendant diſproves the allegation, and ſhews that he did not ſo do, but entered to take his own, and if the defendant proves the corn to be his own, the taking of it is not a treſpaſs to the plaintiff, and ſo the defendant hath diſproved the fact

C. L. E. 242, 3. laid in the declaration; now the general rule is, that where a man hath an uncertain intereſt, and ſows the land, and his eſtate determines, yet he hath a title to the corn that he hath ſown on the land, though the property of the land is altered.

This is true in ſome inſtances, but not in others, for it in general depends on the nature of his title. V. poſt.

(*c.*) And this upon theſe three reaſons.

(1.) *Firſt*,

(1.) *First*, Because it is a public benefit that the lands should be sown and cultivated, and all things that tend to plenty, and increase ought to have the greatest security that the law can give; therefore it is fit that a property in the corn should be supposed distinct from that of the soil, and that this property should be at the entire disposal of the owner, distinct and separate from the land, that all possible encouragement may be given to tillage, and that no man may decline cultivation, under a fear that the profits should be taken by another person. G. L. E. 243.

(2.) *Secondly*, When a person hath sown, he hath gained a special property in the corn by his labour and industry *, and therefore, though his property in the soil changes, yet the property of his labour remains; and this arises from the natural consideration of property, which was at first derived from labour; for a man's own actions are most properly his own, and from thence all ownership begins; for the value of the soil doth not arise more from the natural product, than from the labour and industry that men employ in cultivation; which will very plainly appear, by considering the difference between land in *England*, and land in the *West-Indies*. Ibid.

* Supposing it sown in land legally in his possession, and where he hath a right to expect the possession will continue until he hath reaped his crop, Vide infra.

Besides, if over and above the natural product of a cultivated soil, corn still adds a further value to the land, so that the value of land producing corn exceeds the value of a natural product from another cultivated soil, as much as that doth the product of a waste and barren-soil, it follows that there ought to be another property in the corn, distinct

from

from that of the land, in as much as there is a labour employed in the acquiring and ſowing the corn, diſtinct from the labour whereby the land was at firſt acquired and occupied; there is alſo an expenditure of money in ſowing the corn, diſtinct from that wherewith land was purchaſed; for which reaſon the law, in following nature, doth create a diſtinct property in the corn, different from the ſoil.

G. L. E. 244. (3.) *Thirdly*, There is a property in corn, diſtinct from the ſoil, before the corn is committed to the earth, and that property is not loſt by ſowing it in a man's *own* ſoil; for I cannot loſe the property of what is my own, by putting it in a place which is my own, alſo; but if I ſow my corn in *another* man's ſoil, it ceaſes to be mine, in as much as I ſet it in the place of the natural product of his ſoil, and therefore it muſt belong to the owner, as the natural product of the ſoil did; and were it otherwiſe, men would break in upon the lands of others, and ſow them, and deprive the proprietors of the diſpoſal of their own eſtates, whereby the aggreſſors would raiſe a property to themſelves, from the eſtates of others, and put the owners to the trouble of controverting their rights; every man expects a yearly return of the corn or other grain which he ſows, in his own land; it is reckoned part of his perſonal eſtate, as the corn or grain itſelf was, before it was ſown. But otherwiſe of timber trees planted, for they muſt be ſuppoſed to be annexed to the ſoil, ſince they were planted with the proſpect that they could not be of uſe 'till many years elapſed after.

(*d.*) *Of*

(*d.*) *Of the general Issue in various Cases not before or afterwards particularly noticed.*

In a suit for criminal conversation, that is the gist of the action, and not the assault alledged in the declaration, which is merely matter of form, therefore the proper plea, under the statute of limitations, is, not guilty, within *six* years. Cooke and Sayer, M. 32 G. 2. 14. B. B. N. P. 28.

In an action for a malicious prosecution, or for an injury arising from folly or negligence, as against the drivers of carriages, owners or navigators of vessels, persons employed to perform works skilfully, servants employed in like manner, for misbehaviour of any one in his office, trust, or duty, for deceit, and actions for consequential damages, *not guilty*, doth in general put the whole matter in issue, and under such plea, a defendant may give the whole merits of his case in evidence. So in many cases upon penal actions, as the breach of a statute includes some degree of guilt.

In *replevin*, the general issue is *non cepit*, upon which property cannot be given in evidence, for that ought to be pleaded. 2 Vent. 249.

In an action for slander, *not guilty* only denies the speaking of the words.

In *detinue non detinet*, is the general issue, upon this plea the defendant may give in evidence a gift from the plaintiff, for that proves he does not detain the plaintiff's goods; but he cannot give in evidence that the goods were delivered as a pledge, *&c.* as he might in *trover*. Co. Lit. 283.

In

In *covenant*, the general iſſue is *non eſt factum*, but that merely denies the deed to be the defendant's, and he cannot, under this plea, give any merits in evidence.

To penal actions upon ſtatutes, the common plea, by way of general iſſue, is *nil debet*.

(*e.*) *Examples by way of Illuſtration, with various Caſes relative to ſeveral ſpecies of* Treſpaſs vi et armis, *and on the* Caſe.

IF *tenant* for *life* ſows the land, and dies, his executors ſhall have the corn, and they may take it from off the ground of him in remainder; and if *treſpaſs* be brought, this is good evidence to diſcharge the defendant on *not guilty*. Co. Lit. 55. 5 Co. 116. 1 Rol. Ab. 726, 727.

So it is if *tenant* at *will* ſows the land, and the *leſſor* determine his will. Co. Lit. 55. 5 Co. 116.

But if *tenant* at *will* determine the demiſe by any act of his own, he ſhall not have the corn ſown; for when he determines his will, the intereſt is in another, and therefore he can no more reap the increaſe of his corn, than if he had ſowed in another man's ground, the corn growing in the mean time hindering the owner from all natural increaſe; and therefore to determine the will is to relinquiſh the corn, for to leave the land is to leave the profits of it. 1 Rol. Ab. 727.

So if *feme* copyholder have land *durante viduitate*, and marry, the huſband ſhall not have the corn, but the lord; becauſe ſhe has determined the eſtate by her own will. 1 Rol. Ab. 726. 5 Co. 116. Cro. Eliz. 460. Moor 394.

But if the eſtate be determined by a compulſory, and not by a voluntary act, there the property of the corn doth not alter and go to him that hath intereſt in the land, for the law is, (and ought to be) ſo tender of every man's property, that he ſhall not be ſuppoſed to have parted with it, without a plain 2 Inſt. 81. Co. Lit. 55. 5 Co. 116. Gould. 189.

a plain voluntary act of his own, and consequently, the person who had the property in the corn, shall not be said to quit it, unless he doth some voluntary act whereby he determines his own estate in the lands, and thereby parts with them.

5 Co. 116. Goldf. 190. Moor. 394. 1 Rol. Ab. 726. *Therefore* if a lease be made to *baron* and *feme* during the *coverture*, and they be divorced *causa præcontract'*, yet shall the *baron* have the corn sown, because the marriage is determined by compulsion.

5 Co. 116. Goulsb. 190. So if *tenant* at *will* be *outlawed*, here the will is determined, because he hath forfeited all contracts; but this, being by compulsion, the property of the corn doth not go to the lessor, but to the King, to whom all his chattels are forfeited.

5 Co. 116. Goulf. 189. 1 Rol. Ab. 726. But if a lease be made till the tenant commit waste, and the tenant doth waste, he shall not afterwards have the corn sown, for in this case he determines his lease by a voluntary act of his own.

5 Co. 116. If a man makes a lease at *will*, and the lessor be *outlawed*, whereby the will is determined, yet the lessee shall have the corn sown, and not the King; for here was not any act of the lessee to determine the will, or to alter the property.

Goulf. 189. Cro. El. 469. 1 Rol. Ab. 726. If *tenant* for *life*, or at *will*, forfeit or break a condition, they shall not have the corn sown, for this is a voluntary act within their own power.

Goulf. 189. 1 Rol. Ab. 727. But if a woman who hath an estate during her *widowhood*, makes a lease for years, and the lessee sow the land, and then the woman marries, yet shall the lessee have the corn, for the act of the lessor, after the lease made, cannot alter the property of the lessee, for a

man's

man's property once lawfully vested in him, cannot be devested out of him by the act of another. *Vide* 5 *Co.* 116. *Oland's* case, *contra*; *for although his estate is determined by the act of a stranger, yet he shall not be in a better condition than his lessor was: and this seems to be law.*

It seems also at common law, that if *tenant in dower* die, her executors should have the corn, for the statute of *Merton*, which gives the power to devise it, was only made in affirmance of the common law. 2 Inst. 80. 20 H. 3. c. 2.

If a man dies, leaving issue a daughter, his wife being *privement enseint* of a son, and the daughter enters and sows the land, and then a son is born, she shall have the corn. G. L. E. 248.

If the husband sows the land of his wife, and the wife dies, he shall have the profits. Co. Lit. 55.

Two *joint-tenants*, one of them dies, the corn sown goes to the survivor, and the moiety shall not go to the executors of the deceased; for they are supposed to carry on the cultivation of the soil by a joint stock, and in all joint stocks, except *merchants*, there is a survivorship. G. L. E. 248.

If husband and wife are *joint-tenants*, and the husband sows the land and dies, the corn shall go to the executor of the husband; for this land is not cultivated by a joint stock, but is wholly the corn of the husband, which property seems not to be intirely lost by committing it to their joint possession, no more than if it had been sown in the land of wife only. 1 Rol. Ab. 727. Sed Quær. & V. Co. Lit. 55 a. Cont.

If a woman seised in *fee* or for *life* sows the land, and then takes a husband, and he dies before the severance, the wife shall have the profits, and not the executors of the husband; 1 Rol. Ab. 727.

band; for the corn committed to the ground is a chattel real, that is annexed and belonging to the freehold, and not a chattel perſonal, annexed to and transferred, and therefore without the huſband's diſpoſition of it during his life, it belongs to the wiſe and not to the huſband.

Bract. 96. 1 Rol. Ab. 727. If *baron* ſows the land and dies, before ſeverance, the wife ſhall have the third part of the land ſo ſown for her *dower*; for if a man hath all corn land, ſhe ſhall not wait for her ſubſiſtence for a whole year 'till the corn be removed, and for this reaſon it was doubted at common law, if the widow owed the land whereof ſhe was endowed, whether her executors or the heir ſhould have the corn ſown.

1 Rol. Ab. 727. If a man ſeiſed of a copyhold in fee, ſows the lands, and ſurrenders them to the uſe of his wife, and dies before the ſeverance, it ſeems that the wife ſhall have the corn, and not the executors of the huſband; for this is a diſpoſition of the corn, that being appurtenant to the land; and ſince the huſband hath diſpoſed of it during his life, it cannot go to his executors.

Co. Lit. 55. 1 Rol. Ab. 727. If *tenant* by *ſtatute merchant* ſows the ground, and after is ſatisfied by ſome caſual profit, yet he ſhall have the corn.

Hob. 132. If a man ſows his ground, and dies before ſeverance, the corn goes to the executor, and not to the heir.

Hob. 132. Rol. Ab. 727. If *A.* ſeiſed in fee of land, ſows it, and then conveys to *B.* for life, the remainder to *C.* for life, and *B.* dies before the corn is reaped, *C.* ſhall have it, and not the executors of *B.* for *B.* had not the property of this corn from his own charge and induſtry, but

but merely by the donation of *A.* the corn appertaining to the *land* that was given, and for the ſame reaſon, and by force of the ſame donation that *B.* had the corn, *C.* is to have it after the death of *B.*

But why doth the corn paſs to the donee, as appertaining to the ſoil, when the property of the ſoil alters; and yet ſhall not deſcend to the *heir* as appertaining to the ſoil, when the property of the ſoil remains in the firſt owner? Objection.

Every man's donation being taken moſt ſtrongly againſt himſelf, ſhall paſs not only the land itſelf, but the chattels that belong to the land; but no chattels can deſcend to the heir, they go to the executor; why this is accounted a chattel we have ſhewn already. *Vide ante, Acc. & Con.* Anſwer. Qu. As to heir looms.

A. ſeiſed in *fee* ſows the land, and deviſes it to *B.* for life, remainder to *C.* *B.* ſhall have the corn ſown, and not the executors of *A.*; for *B.* the deviſee, in relation to the chattels belonging to the land, is put in the place of the executors by the words of the will, but if *B.* dies before ſeverance *C.* ſhall have it. Winch. 51.

Tenant for *life*, *remainder* in *fee*, *tenant* for *life* lets the land for years, *leſſee* for years is ouſted, and *tenant* for *life* diſſeiſed, and the *diſſeiſor* lets the land for years, and the *leſſee* of the *diſſeiſor* ſows it, and the *tenant* for *life* dies, the *tenant* for *years* of the *diſſeiſor* ſhall have that crop ſown, and not the *remainder man*; for the *tenant* for *years* of the *diſſeiſor* hath right to the profits of that which he hath ſown, againſt any perſon but him who had right to the land itſelf, and that was the leſſee of tenant for life, and he ſhould 5 Co. 85. Tri. per Pais, 405. Goldſ. 143. Cro. El. 464. 2 Inſt. 81.

 recover

recover againſt the leſſee of the diſſeiſor all the profits that he made of the lands, and therefore the remainder man cannot recover any part of it, for then the leſſee of the diſſeiſor ſhould be doubly charged.

H. b. 132. If *A.* ſeiſed in *fee* ſows land, and gives it to *B.* for life, remainder to *C.* for life, and they both die before ſeverance, it ſhall go to *A.* for when the force of the donation ceaſes, the property returns where it originally was.

1 Rol. Ab. 728. Co. Lit. 55. If *tenant* for *life* ſows any grain or roots of annual profit, they go to his executors, and not to him in remainder. *Cauſa qua ſupra.*

G. L. E. 252. If he plants oak, they go to the remainder man. *Cauſa qua ſupra.*

Co. Lit. 56. 1 Rol. Ab. 727. If he increaſes the *natural* product, either by trenching, or by ſowing of hay-ſeed, this ſhall go to him in remainder, for his executors have no property in the natural product, and improvement is undiſtinguiſhable from the natural product.

Cro. Car. 515. But *hops* reared on ancient ſtocks ſhall go to the executor of *tenant* for *life*, and not to the remainder man, for the poles, the hills, and the dung, whereby the product is made, are the proper chattels of *tenant* for *life*; otherwiſe of garden roots, that cannot be taken up without digging the ſoil of the heir. Co. Lit. 55.

Noy. 149. Kelw. 159. b. 160. a. Whoever hath the property of the corn, may give it in evidence on *not guilty*, or may maintain treſpaſs *quare clauſum fregit*, for to that purpoſe the ſoil is his own.

Bro. General Iſſue, &c. Upon *not guilty* in treſpaſs, the defendant cannot give a *licenſe* in evidence, for this ſuppoſes the act to be done, and juſtifies its lawfulneſs,

fulneſs, and all ſuch matters ought firſt to be exhibited to the court to judge of.

So on *not guilty* the defendant cannot give in evidence the *defect* of fences, for the ſame reaſon. Co. Lit. 283.

In *treſpaſs* on *not guilty*, the defendant gives evidence that he came into the plaintiff's ground to glean; this ought to have been pleaded, for it confeſſes the act of treſpaſs, and juſtifies it as an act lawful for him to do, and therefore it ought to be firſt exhibited to the court to judge of, whether it be lawful or not; but if it had been pleaded, it had been a ſufficient juſtification, for by the cuſtom of *England*, the poor are allowed to glean after the harveſt, which cuſtom ſeems to be built on a part of the *Jewiſh* law, that allowed the poor to glean, and made the harveſt a general time of rejoicing. *Qu. a late determination in B. R.* G. L. E. 253. Tri. per Pais, 399.

In *treſpaſs* on *not guilty* the defendant cannot give in evidence that he came into the plaintiff's cloſe to take his own horſe, but this ought to have been pleaded. Upon ſuch a plea, that the defendant came to take his own horſe, the evidence was, that the plaintiff, as lady of the manor, took the defendant's horſe as an eſtray, and the defendant took him away after he had been cried and marked, without paying for his meat, and it was ruled, that this taking was well enough, and the plaintiff hath an action on the caſe for his meat, for the property of the horſe is ſtill in the defendant 'till the year and day are paſt, and when a man hath property, it is lawful for him to take it; for the very nature of property is a right to poſſeſs and uſe the thing which a man rightfully claims as his own. G. L. E. 253. Tri. per Pais, 394, 395.

G. L. E. 254. Tri. per Pais, 395.

In *trespass* the defendant cannot give in evidence a *right* to a *way*, but he ought to plead it, and if after pleading, he shews in evidence a *right* to the *way* by grant over the plaintiff's ground, from such a place to such a place, though the defendant afterwards purchases more ground, whereby he makes a further use of the way, yet it is well enough, and within the grant; for if I only go between the same bounds or limits, I may afterwards pass wheresoever I please.

Co. Lit. 57. Sed qu. If I cannot maintain trespass against A. for a trespass done by B. by the direction of A?

In *trespass* all the defendants must be principals, for no man can by commanding a trespass, give another authority to do it, therefore no man is guilty but he that *acts*; but in *felony* the very commanding it is unlawful, for though the person commanding is not present at the act, yet he is a remote cause of the felony, and ought to be punished; formerly an intent to commit murder was considered as murder, and the party was punished as a murderer; afterwards the law was altered, because it was not thought reasonable that the party should be punished unless the act followed, and from thence came the notion of principal and accessary; but in treason, the intent is still treason, and therefore they are all principals.

G. L. E. 254.

Aslin & Parkin, M. 32 G. 2. per omnes justic. on a case reserved. B. N. P. 87.

In trespass against the tenant in possession for *mesne* profits, either by the lessor or nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; but it is sufficient to produce the judgment in ejectment, and the writ of possession executed, and to prove the value of the profits, and thereupon he shall recover from the time of the demise laid in the declaration in ejectment.

Where

Where the judgment was against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry; but where the judgment was against the casual ejector, and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. Throp & Fry. Oct. Str. 5. B. N. P. 87.

In case the plaintiff can prove his title accrued before the time of the demise, and prove the defendant to have been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert the title, which he cannot do in case the plaintiff do not go for longer time than is contained in the demise; because being tenant in possession, he must have been served with the declaration, and therefore the record is, against him, conclusive evidence of the title; but against a precedent occupier the record is no evidence, and therefore against such-a-one, it is necessary for the plaintiff to prove his title, and also an actual entry; for trespass being a possessory action, cannot be maintained without it. As to actual entry, *vide ante*, under *not guilty* in *ejectment*, and *Bull. Ni. Pri.* 87 & *seq.* Dacosta & Atkyns, per Eyre, C. J. H. 4 G. 2. B. N. P. 87. Vide 1 Sid. 239.

Trespass for *assault* and *wounding*: the defendant pleads *not guilty*, as to the *vi et armis*, and as to the *assault*, he pleads a justification of *molliter manum imposuit*; the justification shall be first tried, and then the *vi et armis*; for possibly the using of force may be in his G. L. E. 255. Tri. per Pais, 398.

own defence, and therefore juſt and lawful, and ſuch a force as the law doth not oblige him to defend in pleading, and therefore that ought to appear firſt on the juſtification; but if the iſſue of *not guilty* had been to the *wounding*, then that plea might have been firſt tried, becauſe he doth not pretend to juſtify the act, and ſo it might very properly be tried firſt.

This was before the ſtatute, giving leave to plead double: now the uſual courſe is to plead not guilty to the whole, and a juſtification: when the plaintiff muſt firſt prove the whole of his caſe, before the defendant is called upon to prove his juſtification; and ſometimes the plaintiff's witneſſes, prove the defendant's caſe, which prevents the plaintiff's counſel from replying.

G. L. E. 256. In aſſault and battery if the defendant's defence is, that the plaintiff made the firſt aſſault, and the defendant defended himſelf, he ought to plead *ſon aſſault demeſne*, and cannot give it in evidence on the general iſſue: if the defendant pleads that the plaintiff made the firſt aſſault, and proves that the plaintiff bent his fiſt at him, or that he laid his hand to his ſword, this is proof of an aſſault; for where any man ſhews ſigns of violence, it is a ſufficient provocation for the other to reſiſt in his own defence, and the defendant need not ſtay 'till a blow is actually given, before he provides for his defence, for then it may be too late to make any reſiſtance.

2 Keb. 545. But if a man clenches his fiſt, or lays his hand upon his ſword, with this declaration, That *were it not aſſize time he would tell the plaintiff more of his mind*; this is not an aſſault, becauſe he declares his intent *not* to aſſault, and

and then his clenching his fist and laying his hand upon his sword, cannot be reckoned signs of an intention to commit violence, but only of passion, for his bare actions are not to be taken as signs of his mind, when he hath in words expressed himself to the contrary.

If a man punch another with his elbow in earnest discourse, this is not an assault, for it is not any sign of violence intended, or of any hurt, and therefore doth not call for defence, nor is it necessary that it should be obviated by a resistance. 2 Keb. 545.

In an action for *false imprisonment* on *not guilty*, the defendant gives in evidence that he took the plaintiff by virtue of a warrant from a justice of peace; and this is within the statute of 7 *Jac. c.* 5. though the defendant be not an officer, for it says, any others that do any thing by virtue of the command of a Justice of Peace. G. L. E. 257.

If the defendant be not an officer, he is not bound to execute the warrant, because the justices have not power to compel execution of their warrants by any but their own officers, who are put into office, and liable to execute the business of justice; but the defendant may justify the doing the thing which the Justice hath commission to do, as a servant to the justice of peace; for the justice may execute his warrants by his own servants if he pleases; so a constable is not compellable to execute a warrant out of his own liberty, because he is only appointed by the law as an officer to keep the peace within that district only, but he may execute any warrant where the justice hath commission, as any private man may do. G. L. E. 257. Tri. per Pais, 437.

Clayt. 54. In trespass, if the defendant claims by reason of a prescription, he must justify, for he cannot give it in evidence on *not guilty:* If the defendant justify by a prescription to tether *equos* and *boves*, he may give in evidence the tethering of mares and cows, for the feminine gender are within the words of the prescription.

2 Leon. 301. In trespass upon *not guilty* the defendant may give in evidence, that the right of *freehold* was in *J. S.* and that he entered by his command, for if the defendant enters by the command of *J. S.* it is the same as if *J. S.* had entered, and consequently, if *J. S.* hath the right, the estate is vested in him by the entry, and therefore, the defendant is not a trespasser on the plaintiff, and by such evidence as this, he plainly falsifies the plaintiff's declaration, for he proves that he did not break the plaintiff's close, as the declaration sets forth; it is therefore proper for the general issue.

It is usual now to plead liberum tenementum, *which obliges the plaintiff to state his title especially upon the record. In such cases we conceive encouragement ought not to be given to the general issue, as at the trial, the plaintiff may be surprised with a title, of which he was not aware.*

2 Vent. 151. There is a great difference between *torts* and *contracts*. When the action is upon a *tort*, one may be found guilty and the rest acquitted; but when the action is brought upon a *contract*, all or none must be found debtors: Every *trespass* is of its own nature *joint* and *several*; for I may charge the defendants under this relation, as they aided and assisted one another,

another, or as each by his own proper force committed the injury; so that every *trespass* is in the very allegation several as well as joint; for it supposes a man to have used his own proper force, as well as to have assisted his companion, and if a man be found guilty of one part of the charge, but not of the other, yet the injury ought to be redressed; but a *contract* may be joint only, and not several, and when a man declares of a *joint-contract*, and proves a *several* one, he doth not prove the *same* contract, which he hath alledged in his declaration.

In an action on the *case* brought against an *inn-keeper*, for suffering the goods of the plaintiff his guest to be taken out of his house; upon *not guilty* pleaded, the defendant may give in evidence that he told the plaintiff that his house was full, and that he could not lodge him, and that notwithstanding the plaintiff went in and lodged in his house; for this evidence falsifies the declaration, for it proves that there was no injury done to the plaintiff as *guest* to the defendant. Bendl. 18. pl. 72. Dy. 158. p. 32. 1 And. 26. p. 69. 1 Roll. Ab. 3.

[3.] Of *Not-Guilty* in *Trover.*

ON this issue two things are to be proved by the plaintiff.

(1.) The *Trover.*

(2.) The *Conversion.*

And here of *General* and *Special Property.*

1 Rol. Ab. 6. (1.) *First*, as to the *trover*, that is the finding, or in other words, that the goods came to the defendant's hands, and were in his possession.

G. L. E. 250. In *trover* against *husband* and *wife*, the proving of the goods in the possession of the *wife* is sufficient, for their property is but one, and the possession of the wife is the possession of the husband also.

2 Bulst. 311, 312. If goods are delivered by the owner to *A.* to keep, and he *converts* them to his own use, this is sufficient evidence in *trover*, for though he comes lawfully by the possession, yet if he *converts* another man's property, the owner must be redressed.

Cro. Jac. 245. So if goods are pawned, and the owner tender the money, and the bailee refuses to deliver them, this is evidence in *trover*, for when any man hath a naked possession, without a right of converting the goods, the owner may bring *trover*, for the words of the declaration are, *ad manus & possessionem per inventionem devenerunt*; so that coming to his possession is an immaterial part of the charge, and if the plaintiff proves that they came into his possession any other way, it suffices, for it is

not enough for the defendant to ſay, that he had the goods, though not *per inventionem*, any more than to ſay that a bond is his deed, and deny the date.

The converſion is the *giſt* of the action, and the manner in which the goods came to the hands of the defendant is only inducement: and therefore the plaintiff may declare upon a *devenerunt ad manus* generally, or ſpecially *per inventionem* (though the defendant came to the goods by delivery): It is ſufficient for the plaintiff to prove property in himſelf, poſſeſſion to have been in the defendant, and a converſion by him. B. N. P. 33. 1 Danv. 23.

(2.) *Secondly*, as to the *converſion*, and here of *General and Special Property*.

If a man requires the delivery of his goods, and the perſon who has the poſſeſſion refuſes to deliver them, this is good evidence of a *converſion*; for to what end ſhould a man deny me my own, if he himſelf did not make uſe of them; ſo that upon ſuch evidence as this, it is to be preſumed that the defendant hath converted them to his own uſe. 10 Co. 56, 57. 1 Sid. 127. 2 Bulſt. 314.

Roll makes a diſtinction where goods came to the defendant's poſſeſſion by his *own* act, and where by the *bailment* of the plaintiff; and that in the *firſt* caſe a *requeſt* and *denial* is a *converſion*, but not in the *laſt*; but this does not ſeem to be law, for in both caſes, the *requeſt* and *denial* is not a *converſion*, but only *evidence* of a *converſion*. G. L. E. 261. 1 Rol. Ab. 5. Goulſb. 152. Moor. 460.

But though the *requeſt* and *denial* are evidence to a jury of a *converſion*, yet it is not a *converſion*; for the jury are judges of what is probable and improbable, and they may, according to the circumſtances, think it rather pro- 10 Co. 56, 57. 1 Sid. 127. Cro. El. 495. 2 Bulſ. 314. 1 Vent. 401.

bable,

bable, that there was a conversion than otherwise; but if the jury refer these circumstances to the court, the court cannot adjudge that there is a *conversion*, for the court are not judges of the *probability* of a *fact*, but of the *law*; and the circumstances may be such as do not *necessarily* amount to a *conversion*, though they may be such, as would make a reasonable man believe that there was a *conversion*.

Hutton. 10. C. 10. Car. 262. 6 Mod. 212. 2 Salk. 655.

The bare denying to return a thing without using of it, is not in law a *conversion* of it to my use; for a denial *ex vi termini*, doth not amount to an using of the thing demanded, it only affords a presumption of fact, that I have used it.

2 Bulst. 314. 1 Rol 132.

If *trover* be for money, and a request and denial be proved, this is so strong a presumption of the *conversion*, that nothing can be proved to the contrary; for the presumption must stand 'till the contrary be proved, and the contrary to this presumption can never be proved, for all money being exactly alike, that the individual money found was not converted can never be proved. Sed qu. If *trover* will lie for money not in a bag, &c. or marked? an action for money had and received is much better.

G. L. E. 262.

But if *trover* be for money in a bag, though the defendant doth deny to deliver it, yet he may prove that there was not any conversion, for if he lays the individual money sealed in the bag in the place where he first had it, and hath witnesses of its continuance there, without removal, this is not a conversion, and such evidence will destroy the presumption that arose from his denial.

This case shews the propriety of the note subjoined to the former case; and *qu.* If proof of

of denial would not in this case intitle the plaintiff to recover? If not, the action should certainly be for money had and received.

If the owner requests a man to deliver a beam of timber, or a sow of lead lying in his land, and he denies to do it, this is *prima facie* an *evidence* of *conversion*, though less strong, because the defendant in this case could not deliver it without trouble and charge to himself, and that might be the reason of his denial, and not because he had applied it to his own use; and in this case, if the defendant proves that the beam or sow lay there still, after his denial, this plainly disproves a conversion. 2 Rol. Ab. 310.

In such case *detinue* might be the proper action, but the plaintiff should be prepared to prove, that he offered to remove it himself, at his own expence.

Where the defendant hath a general property, he may give it in evidence on the general issue, for the general issue is the putting the plaintiff to the proof of the fact laid in the declaration, part of which is, that *he* hath the property of the thing in demand, and that the defendant converted it to his own use; so that the plaintiff must prove a property in himself, but the defendant may prove a better title in himself to falsify that claim; and this is good evidence on the general issue, for it disproves the fact laid in the declaration, because it proves that the plaintiff had *not* the property, and that the defendant did not convert it, for no man can be said to convert that which was his own before, so that for the defendant to make to himself a general property, is proper on the general issue, because it doth falsify the whole charge of the declaration. Jon. 140.

1 Rol. Ab. 5. If a man take my horse and ride him, and re-deliver him to me again, I may have an action of *trover* against him, notwithstanding the re-delivery, for he had him in his possession, and did *convert* him to his use, and his re-delivery is only evidence in mitigation of damages.

Sed qu. If an action for riding the horse, would not be better.

1 Rol. Ab. 6. If I deliver goods to a *common carrier*, to deliver at such a place, and they are stolen from him, this is not a *conversion* in the carrier to maintain an action of *trover* and *conversion*; for the stealing the goods can never be reckoned a *conversion* of them to the carrier's use.

G. L. E. 264. But in this case, an action may be brought on the custom of *England*, that carriers should safely keep the goods that are delivered to them: and this evidence will maintain that action.

G. L. E. 264. 1 Rol. Ab. 6. The King's purveyor takes beds, and appoints the King's servants to lie in them; this is not a conversion to the use of the purveyor, but of the King, and therefore may be given in evidence, to discharge the defendant, in an action of *trover*.

Sed qu. If, and upon what occasions, the King's purveyor can now do this?

G. L. E. 264. Cites 38 El. B.R. per Fenner. 1 Str. 576. If the nature of the thing be altered, this is good evidence of a *conversion*; as if leather be taken and made into shoes; but this is not good evidence in *detinue*, where the demand of the thing is in *specie*, and where no conversion is alledged.

G. L. E 264. Tri. per Pais, 456. Clayton, 57. Oates were taken from the owner, and carried to the mill to make into meal, and before it was done, the owner went and prohibited

bited the miller, who notwithstanding proceeded to grind them, this held a conversion in the miller, for it is an alteration of the property by him who had the possession contrary to the will of the owner.

A man lends his horse to a special purpose, and the defendant abuses him, this is not evidence to maintain *trover*, for though the horse be abused in the journey, it is not a *conversion* to the defendant's use, contrary to the will of the owner on the delivery. G. L. E. 265. Tri per Pais, 456.

But this is evidence to maintain a *special* action on the *case*, though not *trover*; for the abuse is not a *conversion* to the defendant's use, because the abuse arises by negligence, which is not any *use*; and the conversion is an *use*, contrary to the design of the bailment, and therefore they cannot be evidence one of another. G. L. E. 265.

But if a man lends his horse to go to *York*, and he goes to *Carlisle*, evidence hereof will maintain *trover* and *conversion*, for this is an *act* contrary to the express bailment, and consequently is a *conversion* of the plaintiff's horse, in the defendant's possession, to his *own use*. 2 Bulst. 309.

Trover for an horse of fifteen pounds value, the jury give but three pounds damages, thinking the plaintiff had received his horse again; a new action lies for the value of the horse, wherein evidence may be given, that the first verdict was only for the *conversion*, and not for the value of the horse itself. *Sed qu.* G. L. E. 265. Tri. per Pais, 454.

In *trover* by an *administrator* where the *conversion* was in the time of the *intestate*, the plaintiff must shew his letters of administration, for he must in this case prove possession in the *intestate*, and that he is his representa- G. L. E. 266. Tri. per Pais, 454.

 tive;

tive; but where the *conversion* is after the death of the *intestate*, he need not shew them, for there it is only necessary to prove the possession in himself, which is good proof of a title *prima facie*, against all persons that cannot shew a better right, and by proving it, being taken out of his possession and converted, he will maintain his action.

1 Sid. 264.

If an unjust taking of goods be proved, as the taking my hat off my head, this is good proof of the *conversion*, though there be no proof of a demand and refusal; for when I prove the taking away of any thing from me, without my leave or allowance, the person must be presumed to take it to his own use, for it cannot be supposed that what is taken away from me, without my consent, is taken for my use, and consequently, this is proof, of converting my property to the defendant's own use.

Qu. If *trespass* would not be much *safer?*

Raym. 472. 2 Vent. 169. Tophiv, v. Lattimore.

If a man brings *trespass* and recovers, he can never afterwards maintain *trover*, as the former action is a good plea in bar to the latter, but if a man brings *trespass*, and judgment be given against him, he may maintain *trover* afterwards.

G. L. F 967. Cites Lynch and Mercer. Trial at Bar in the Common Pleas in Ireland, before Ch. J. Singleton.

If the taking be *tortious*, the owner may maintain *trespass*, or *trover*; for where there is a wrong in the taking, it is, in the understanding of law, a taking with *force* and *arms*, and therefore in such case, the party may punish either the *taking* or the *conversion*, and consequently, evidence of this will maintain either *trover* or *trespass*: but if a man seizes goods by right, * but detains them by wrong, there the plaintiff cannot bring *trespass*, which punishes the *tortious taking*, but he ought to bring

* This doctrine is fully illustrated in the case of Smith &

bring *trover*, where the gist of the complaint is the *conversion*: but where *two* actions are for the *same* thing, one is a good plea to the other, to avoid needless vexation.

another affees v. Milles, post, under tit. Demurrer to evidence, immediately after the form of a demurrer to evidence. Head [D]

If it is in my election to bring *trespass* or *trover*, and I bring *trespass* and fail, and then bring *trover*, there the *first* cannot be pleaded in bar of the *last* action, for possibly in the action of *trespass*, I might prove the taking my goods, but not *tortiously*, and so *trespass* will not lie, but *trover* only; and because I bring an action that is not proper, and fail in it for that reason, *viz.* because it is not proper; it is not thence to be concluded that I must fail in that action which is allowed to be proper; but if I fail in an action that is proper for me, it is then consonant to justice, that I should not begin another, on the *same* ground, for, from the justice of the former determination, it is presumed to be a needless vexation.

In *trover*, the plaintiff must have *property*, not so in *trespass*, for in *trover* you admit the defendant to have possession, and therefore you must prove a better right; but in *trespass* you have the *possession*, for it supposes a violation of the *possession*, and this is sufficient in law against a wrong doer.

G. I. E. 269. Cites per Holt.

But I conceive that in trover I need not prove an absolute property in the goods, but that proving a special property is sufficient, unless the defendant can make a better title. Vide infra.

This action may be brought by a carrier or bailee; or by a finder, for that will enable him to keep the thing against all but the right owner.

1 Mod. 31. Stra. 505.

2 Saund. 47. A ſheriff who hath taken goods in execution may bring *trover* for them, if they were taken away before the ſale.

B. N. P. 33. per Powel, J. on Midland circuit, Salk. M. S. S. If an houſe be blown down and a ſtranger take away the timber, the leſſee for life may bring *trover*, for he hath a ſpecial property to make uſe of the ſame (as if he would rebuild) though the general property be in the reverſioner.

B. N. P. 33. Lord Cullen's caſe at bar, K. B. And property is ſufficient without poſſeſſion; therefore on the trial of an ejectment for a mine, it was holden, that a recovery in trover for a parcel of lead dug out of the mine was no evidence of the plaintiff's poſſeſſion.

Salk. 290. One jointenant or tenant in common, or parcener, cannot bring trover againſt his companion for a thing ſtill in his poſſeſſion, becauſe the poſſeſſion of one is the poſſeſſion of both; if he do, it is good evidence upon Co. Lit. 200. B. N. P. 34. Barnardiſtone v. Chapman, & Smith. H. 6 G. not guilty. But if one tenant in common *deſtroy* the thing in common, the other may bring *trover*.

[4.] Of *Nullum facit Vastum.*

IF a man brings an action of *waste*, upon the general issue of *nullum fecit vastum*, the defendant cannot give in evidence, that the houses were *repaired*, and the *waste* set right before the action brought, for this confesses the *waste* and avoids the *action*, by shewing that it is not lawful for the plaintiff to bring his action, where the injury is already redressed, and on the general issue the plaintiff denies any cause of action. 5 Co. 119. Co. Lit. 53, 283. 2 Rol. Ab. 682. Vid. 1 Sid. 225. 1 Mod. 94.

So upon this issue the defendant cannot give in evidence a *licence* to cut down trees, for this is to confess, and not to deny the doing of the *waste*. 11 H. 8. 1. b.

But the defendant may give in evidence that the house was ruinous at the time of the lease made, that it fell by the *wind*, or by *tempest*, because this destruction arose in the first case by the act of the plaintiff, and in the last by the act of God, and therefore it was not *waste*; and when the defendant proves that there is not any waste, he falsifies the declaration, which is proper for the general issue. 12 H. 8. 1. a. Co. Lit. 283. a. 1 Jones, 240.

So the defendant may give in evidence that the house was *burnt* by accident, for this also is not waste, because it cannot be supposed within the power of the party to prevent. 12 H. 8. 1. a. Co. Lit. 283.

So upon the general issue, evidence may be given that the destruction happened by tempest, lightning, enemies, &c. 5 Com. Dig. 337.

But if the defendant cut timber, and useth it in repairs, he cannot give that in evidence on the general issue, but he ought to plead 12 H. 8. 1. a. Doct. Plac. 199. Co. Lit. 283.

it ſpecially, for this evidence confeſſes and avoids the declaration, and it admits the fact of the declaration, but brings thoſe circumſtances in, which ſhew the fact may be lawfully done; and theſe, for the foregoing reaſons, ought to be offered to the court.

Objection. 12 H. 8. 1. a. But it may be ſaid that this evidence falſifies the declaration, in as much as it proves that the cutting of the timber is not to the diſinheritance of the leſſor, and therefore that it may be given in evidence on the general iſſue.

(Anſwer.) G. L. E. 275. If you admit any *fact*, you allow all the *conſequences* of that *fact*; now when the defendant admits, or the evidence proves the cutting of the trees, the defendant muſt allow the *conſequences* of that *fact*, when it is to the leſſor's diſinheritance; for on the *general iſſue* nothing but the *truth* of the *fact* alledged in the declaration, can be called in queſtion; you cannot therefore, on this iſſue, allow the *truth* of the *fact*, and yet offer it to the jury, and deny all the *conſequences* of the *law* attending upon the fact, becauſe it is improper for the jury, who are not judges of the *law*, and therefore muſt be offered to the court, who are; and conſequently, notwithſtanding this objection, it ought to be pleaded.

[5.] *Of nul tiel tort, et nul disseisin.*

UPON this issue a man cannot give in evidence a *release* made after the *disseisin* committed, but it ought to be pleaded; for this evidence admits the *disseisin*, and at the same time shews that it was not lawful for the plaintiff to bring his action; and therefore it is good matter of justification. Co. Lit. 283. Jenk. cent. 18. Caf. 35.

But in some cases, if the release was before the *disseisin*, it would be good evidence; as if a man seised of a rent-charge, releases the rent, and then demands it, and it is denied; this release is good evidence on the issue of *nul tiel tort, et nul disseisin*, because here is not any seisin or freehold of the rent in being, and therefore there could not be any *disseisin* of it. Co. Lit. 283.

If a man bring an *assize* for *common of estovers*, when the house is down to which the estovers belong, the defendant may plead *nul tort, et nul disseisin*, and give this matter in evidence, for there is not any wrong, nor any *disseisin* if it become impossible by the party's own fault, that the estovers should be rendered to him. Hob. 39.

[6.] Of *Nil Debet*.

5 Com. Dig. 222.

THE defendant may plead the general iſſue *nil debet* to debt upon contract, not upon bond. *Vide infra* for the reaſon.

G. L. E. 276.

Where the debt ariſes by ſpecialty, it cannot be diſſolved but by ſpecialty, but where the debt ariſes by act in *Pais*, it may be diſſolved by ſhewing any act in *Pais* in evidence; as if a debt ariſes by parol agreement, it may be diſſolved by payment, without any writing concerning it; for every contract is ſuppoſed to have continuance, unleſs deſtroyed by a contract of as high a nature.

This iſſue is twofold,

[1.] *per legem.*
[2.] *per patriam.*

Decret. Lib. 5. Tit. 34.

(1.) *Firſt*, *per legem*, and that is *law-wager*: this was formerly invented by the clergy, to purge themſelves from criminal proſecutions, and was ſo managed that it gave them a greater freedom from puniſhment than other people; but they ſtill pretended to adhere to theſe two rules, that if the crime were manifeſt, they would not allow purgation; and it was required that the compurgators themſelves ſhould be honeſt. From the clergy it came over into civil proſecutions, upon this ground, that if a man thought another of that fair character, that it was fit to truſt him with money, without the ſolemnities of a deed, it was but fit he ſhould truſt his conſcience with the payment of it, for there might have been payment ſo ſecretly made, that the debtor could not prove

it;

it; and upon this foundation it was, that a man could not wage his law againſt an infant, for the contract did not begin on that diſcretionary truſt that it doth, when made with a man of full age; the ſame law alſo prevails when a man gives money to another to pay me, I may charge him as my receiver, and he ſhall never wage his law, becauſe the truſt was never repoſed in him by me, who am the plaintiff in the action.

In this invention the clergy ſeem to follow the *Gothick* humour. The *Goths* in their trials fixed upon a deciſion by twelve, ſo the clergy thought proper to form this fictitious trial after the ſame manner, and therefore they required twelve compurgators.

We have alſo ſeveral caſes conformable to the rules of the canon law.

Firſt, If the act, demand, *&c.* be manifeſt, it will not admit of any purgation, and therefore on debt for *rent* on a *leaſe* for years, the defendant ſhall not *wage* his *law*, for the reaſon on which the action ariſes is from the taking the profits of the eſtate in leaſe, which is manifeſt in the neighbourhood, and therefore the defendant cannot ſwear as to the payment of the debt. G. L. E. 278.

Secondly, Another rule is, that the purgation muſt be made by honeſt perſons, and men of unſpotted reputation, which is a rule carried ſomething further than the canoniſts would carry their rule in criminal matters, for the reputation of the defendant might be blemiſhed in a criminal proſecution, but in civil actions, to which our law confined this manner of trial, they required alſo a fair reputation in the defendant, for which reaſon *he* was not admitted to *wage* his *law*, who was *at-*

tainted

tainted or *outlawed* in an action which charged him with any *deceit* or *injury*, and therefore, where a man was impleaded in an action of *deceit* or *trespass*, he could not wage his law.

Vaugh. 101. So in *case*, there cannot be any *law-wager*, because the damages are uncertain, and a man cannot make oath of paying what he doth not know to be due, and which he ought to pay.

(2.) *Secondly, Nil debet per patriam.*

4 Rep. 94. 2 Cro. 217. Alleyn. 75. If a man makes a *lease* for years, either by *parol* or *indenture*, *nil debet* is the general issue; but in debt upon an obligation *non est factum*, as hath been shewn, is the general issue, and the reason of the difference is this, in case of a bond, the debt arises on the owning of it, by the specialty; and therefore the consequence is, that you cannot disown it on the issue of *nil debet*, for then you would fall into this absurdity, that you would deny the debt, yet not deny the deed which owns the debt; now you cannot disown the deed which confesses the debt under your own hand and seal, without denying it to be your own deed, which issue is *non est factum*, and without disowning the deed, you cannot disown the debt, which arises on the deed only.

G. L. E. 279. But in case of a lease by deed for years, the demand arises not only on the deed, but on the taking of the profits in pursuance of that contract, for there is not any debt until the day of payment, and this doth not depend upon the act of the lessee only, as in the former case the debt depended on the mere

mere act and acknowledgment of the obligor, but also upon the act of the lessor in quitting the premises, so that denying the contract, by pleading *non est factum*, could not be a general issue to that purpose, because not commensurate with the declaration, for it might be the deed of the lessee, and yet no debt might arise to the lessor; because it is not the deed alone that is required to make a debt in this case; now, since an act in *Pais* as well as the deed, goes to the creating this debt, by taking away the act in *Pais* you destroy the debt, and therefore shewing any act that infers an impossibility of the lessee's taking the profits, is a good discharge of the debt. *Vide infra.* V. 1 Rol. Ab. 605.

But though this demand is not merely founded on the contract, but on the taking of the profits also, yet in some cases, I may charge my lessee though he never take the profits, and this is where I charge the lessee on his contract, and as a taker of the profits of my estate and freehold*, and he cannot discharge himself from such a demand, but by shewing his own act or laches in excuse, which the rules of law will never allow as a good excuse; and then, in such a case, he is pernor of the profits *de jure*, though not *de facto*; so the law looks upon him as my tenant, and as taking the profits of my estate, because he cannot sufficiently excuse himself when I charge him with it.

* i. e. where lessor quits possession, and lessee may enter. V. infra.

Therefore, if I make a lease and quit possession, though the lessee never enters, I may charge him in debt for rent, so if he enters and assigns the premises to another. *Vide infra.* 1 Rol. Ab 605. 1 Sid. 240. 2 Vent. 209. 3 Mod. 325. Co. Lit. 54. 5 Co. 77. a. b.

But

G. L. E. 281.

But if my lessee enters and assigns the premises, I can never charge him with waste committed after assignment, for though the law books own him as my tenant *de jure*, on his own contract, which by his own act cannot be dissolved, yet this is only to answer my rent, which by his contract he had undertaken to levy, and pay me out of the profits; but this supposition of law shall not make him answer for the wrongful acts of another, to whom he had a legal power to assign the lands; especially when the penalty by the words of the statute is laid on the very tenant, for the supposition and notions of the law are framed to do every body right, but not to do any man an injury.

G. L. E. 281. Tri. per Pais, 418.

The last receipt is good evidence that all before is paid, for the lessee for years was antiently reckoned in the nature of a receiver or bailiff of the freehold, and therefore upon any such contracts he was chargeable as a debtor to the freeholder, upon taking the profits of the estate, that in the eye of the law do belong to the person whom the law makes tenant of the freehold; now no one can be supposed to continue another in the possession of the estate, and to discharge him on the receipt of the last rent, if he had not received what was formerly due; no more than a man would state accounts with his steward, and discharge him on the accounts of this year, before he had received what was precedent; the very continuing in the same state, and a man's behaving so well as to account for the money due this year, is a presumption that he hath done the same thing formerly, or else a man would not now have suffered

Co. Lit. 373. Dy. 71. Co. 65. Pennan's case. 1 Sid. 44. Moor. 35, 118. 1 Sid. 151. al. contra. 2 Leon. 15. Goldf. 80, 81. Tri. per Pais, 412, 415, 518.

ſuffered it: if this acquittance be under hand and ſeal, it may be pleaded, and it is ſuch evidence as nothing can be proved to the contrary, for this is evidence by ſpecialty, and any deceit or miſtake in former payments is but matter in *Pais*, and therefore not of ſo high a nature as the deed; and in giving evidence every thing muſt be contradicted by a matter of the ſame notoriety, as that whereby it is proved. *Sed qu.?* non-payment being a negative? 1 Mod. 118.

Eviction, expulſion, and any *ſuſpenſion* of *rent*, is good evidence upon *nil debet*, as that amounts to diſcharge and falſify in the caſe of complaint; for in ſuch caſe there was not any pernancy of the profits whereby I could become debtor to him in reverſion, and ſo the act in *Pais* is diſcharged, which goes of neceſſity to the creating of this debt. *It ſhould be obſerved that ſome have held it ought to be pleaded.* G. L. E. 282.

If the leſſor enter into part, the whole rent is ſuſpended, as the leſſor cannot apportion it by a wrongful act of his own; for if the party himſelf, by his own wrong, doth hinder himſelf from the benefit of his own entire contract, the jury ought not to divide it in his favour, as poſſibly the leſſee would not have contracted for one part without the other. 1 Inſt. 148. a. 1 Vent. 277. Rolls. Tit. Extinguiſhment. 398.

If a ſtranger * evict the leſſee of part of the land, the rent muſt be apportioned; for though part be taken away, yet as ſome part remains, there is a part of the conſideration money remaining due to the leſſor, for otherwiſe the act of law in the ſtranger's recovery would do wrong to the leſſor. *Sed qu. as to this caſe of eviction by a ſtranger? If the ſtranger* G. L. E. 283.

* This muſt mean having legal title.

stranger had legal title, why should eviction by him differ from eviction by the lessor? If the stranger had not title, why should his recovery injure the lessor? Besides, the recovery might be by covin, or the effect of negligence in the lessee.

G. L. E. 283. Tri. per Pais, 363. If a demise be pleaded, a lease upon condition is good evidence to maintain the declaration, because a lease upon condition, is a lease which maintains the truth of the declation, *quod cum I. S. dimisisset.*

2 Rol. Ab. 677. In debt for rent upon a lease, and *nil debet* pleaded, *ne unques seise de la terre* may be given in evidence; for if the lessor doth keep possession against the lessee, so that he cannot enter, in as much as this action arises, not on the contract only, but on the pernancy of the profits in pursuance of that contract, there is not any rent due, consequently this is evidence that there is not any debt, and therefore it proves the issue.

1 Rol. Ab. 605. But if the lessor waives the possession, though the lessee never enters, yet an action of debt lies for the rent; for although the lessee did not enter and take the profits, yet since he might have entered and have taken them, he cannot make his own fault and laches any part of his defence. *Vide ante.*

2 Rol. Ab. 677. Tri. per Pais, 412. But on the plea of *riens arrere*, or levy *per* distress, *ne unque seise de la terre* is not good evidence, for when a man insists that there is nothing behind of the rent, or that it is already levied by distress, it supposes that he has the possession of that, for which he has already paid the rent, or for which the rent is already levied.

2 Rol. Ab. 683. 9 H. 7. 3. b. In debt for the arrears of an *account* upon *nil debet*, the defendant may give in evidence that

that there was not any ſuch account, for if there were no ſuch account, there could not be any arrears of it, in which caſe the defendant does not owe any thing to the plaintiff as arrears upon an account.

Debt for rent on a leaſe: the evidence to prove the leaſe was, that the plaintiff leaſed the houſe to the defendant at a rent, but no time mentioned, and it was agreed at the ſame time that the leſſee was not to leave it without half a year's warning: the action lies; for when the rent is payable half yearly, and the leſſor permits him to continue any part of the half year, it is an indication of his will that he ſhould continue the whole half year; and the like law as to a quarter's notice, if the rent be payable quarterly. G. L. E. 284. cites Hill. Aff. 1700.

Where a man ſhews *payment*, he falſifies the declaration, which is proper upon the general iſſue; but where he ſhews a *releaſe*, he confeſſes and avoids the debt; he admits the contract and the pernancy of the profits in purſuance of the agreement, but inſiſts on a counter-agreement. G. L. E. 285.

Upon *nil debet* pleaded, it was doubted whether a defendant might give in evidence that his leſſor was bound by covenant to repair the houſe, and that the leſſee expended the rent in neceſſary reparations; two judges againſt one held, that this was a good *diſcharge* of the tenant, becauſe it is very convenient that the law ſhould look upon this as a *payment*, and not put the leſſee to ſue his covenant, for the houſe might tumble down before the tenant could have the effect of his ſuit; but the judges differed upon another point, *viz.* Whether the expenditure for reparations ſhould be pleaded, or given in evidence? G. L. E. 285, Cro. El. 263. 12 H. 8. 6 b. 1 In. per Pal. 415, &c.

dence? The latter seems to be the best opinion, because, as it is a *discharge*, it amounts to *payment*, and then it is good evidence, on *nil debet*; for if the rent be paid, it is not a debt; but, should it be pleaded, it is the plea of a *collateral agreement*, in *satisfaction* of the debt, and no such agreement can be proved; for though there was an agreement that the lessor should repair, yet there was not any agreement that the lessee should expend his rent on such reparations.

For the last reason, I conceive that expenditure in repairs is not any answer to the plaintiff's action, whether on the general issue, or upon a special plea. Vide infra.

Cro. El. 223. Upon *nil debet*, payment is good evidence to discharge the debt, for the issue is in the present tense, whether there be a debt or not at that instant when the issue was taken, and there is not any debt where it is paid.

G. L. E. 286. Tri. per Pais, 420. 12 H. 8. 1. But on *nil debet*, a *release* cannot be given in evidence, for though a debt when it is released is no more than when it was paid, yet when it is discharged by release under hand and seal, it must be pleaded and shewn to the court, that it may appear to the court to be discharged with those apt words and solemnities that the law requires to make a legal contract; for verbal contracts in such cases are not sufficient, because they are *nuda pacta*, which do not create any obligations.

Sal 565. *Nil debet* is a plea in *debt* for an *escape*; for the commitment is only inducement.

1 Mod 116. 3 Keb. 305. In an action of *escape*, and *nil debet* pleaded, fresh pursuit may be given in evidence, for by proof of the fresh pursuit he falsifies the declaration, for it is plain he doth not let the prisoner go at large by his (the defendant's) permission, and the very gist of the declaration

declaration is *quod permisit le prisoner ire ad largum.*

On *nil debet*, the retainer of the same sum by verbal agreement was given in evidence, and allowed to be good, for this amounts to a *payment*, but when the lease is by deed, it cannot be pleaded without deed. *Sed qu. if it cannot be given in evidence as payment on nil debet?* G. L. E. 287.

Suppose debt for rent, and the defence is expence in reparation, it must be pleaded as a counter-agreement, in satisfaction of the debt, and if the lease be by deed, the defendant must plead this counter-agreement by deed, else *non solvitur eo ligamine quo ligatur. I conceive this must mean where there was an actual agreement that the lessee should expend so much of the rent in repairs, as should be necessary. Vide supra. Et qu. if this is not payment? Or, if a sett-off might not be pleaded?* Godb. 80. 1 Rol. Ab. 605.

Objection. But it may be objected, that since two debts of equal value, in two several persons, are not satisfaction to each other without agreement, which must be pleaded, why should there be any recouper, or balance of demands in this case? G. L. E. 287.

Answer. It is true, the two debts of equal value, are not a satisfaction to each other, and the reason is, because nothing can come in proof, but the truth of the matter alledged.

When one debt is alledged in the declaration, you shall not encounter it with the proof of another, to which no man can come prepared; for if one debt were to balance another in this manner, all the transactions during the whole life time of the parties, must be run over in every single action, which G. L. E. 287.

would make suits infinite: but it is not unreasonable to balance demands arising on the *same contract*, and in the *same action*; for the law, to avoid circuity of actions, considers the whole matter of the same demand, and doth not take it in part, to break it into several actions, for that is contrary to the office of a judge, which is to determine, and not to multiply controversies; and therefore if a disseisor disburses money in repairs, to have a rent charge issuing out of the land, it shall be recovered in damage *, for the law balances the damages on view of the whole matter, and not on a partial consideration of the damage merely belonging to the disseisin, for that would create another action, and so in this case, the law considers the money expended in repairs, as paid to the lessor. *Qu. as before, if the money must not be expended by virtue of the lessor's agreement with the lessee, which amounts to a licence from the lessor, to apply the rent in repairs?*

Qu. A sett off since the statutes 2 G. 2. c. 22. s. 13. 5 G. 2. c. 30. s. 28. 8 G. 2. c. 24. s. 5.

* Qu. de hoc? A disseisor being a wrong doer, if he disburses money on my estate without my will, shall he have a right to recover?

Where a matter may be intended different ways on the allegation, so as to make or not make a right in the plaintiff, such allegation is not good; but if it is necessary that the evidence should settle the doubt, there the matter shall be intended for the plaintiff, if found for him; as if in debt for rent the plaintiff sets forth that *A.* was possessed of lands for ninety-nine years, who demised the premises to the defendant for twenty-one years, and then *A.* granted the reversion to the plaintiff, and so for rent in arrear he brought his action; now this upon the allegation may be intended an ineffectual or inefficacious grant of the reversion, because he has not shewn any *attornment*, yet if the defendant

Raym. 487. 2 Rep. 489.

defendant pleads *nil debet*, if it be found for the plaintiff, there, what was before doubtful on the words of the declaration, muſt be aſcertained, for if there was not an effectual grant proved, there could not be any debt due to the plaintiff; an effectual grant muſt therefore be ſuppoſed to have been proved, otherwiſe there could not be a debt, and ſo the word *conceſſit*, that before ſtood indifferent, muſt be intended a grant made effectual by *attornment*, and not an ineffectual or inefficacious grant; for the jury muſt not be intended to give a falſe verdict, and ſuch conſtruction cannot be made of the allegation, as muſt neceſſarily falſify the verdict.

In debt for not ſetting out tithes, *nil debet* is the general iſſue to bring the matter in queſtion. G. L. E. 289.

In general, where the action of debt is not founded upon a bond, or other *deed*, the plea is good, in all caſes, where nothing is due at the time of the action. 5 Com. Dig. 212.

(II.) Of the General Issue in Criminal Proceedings.

(a.) *Of the Plea of Not Guilty.*

L. Hawk. B. 2. c. 38. 2 V. 563.

THE form of the general iſſue is, in capital caſes, "That he (the priſoner) is "not in any wiſe guilty thereof, and of this, "for good and ill, he puts himſelf upon the "country."

Ibid.

The general iſſue is pleadable in capital caſes, together with any other plea in bar, or abatement, which is not repugnant to it, and it may alſo be pleaded even after ſuch plea found againſt a defendant *.

* This ſurely does not mean after the general iſſue pleaded. V. Hawk. B. 2. c. 23. ſ. 28. & 137.

L. Hawk. 2 V. 619. ſ. 44.

The plea of the general iſſue in *criminal* proceedings puts all the merits in iſſue, contrary to what it doth in *civil* proceedings. As for inſtance, *ſon aſſault demeſne* may be given in evidence on the general iſſue upon an indictment, but not in an action.

2 Hawk. P. C. 435. 1 Salk. 288. 2 Hal. P. C. 179, 291. 3 Inſt. 230. 1 Hal. P. C. 361.

If an indictment be for felony at one day, and the evidence be of felony at another day, yet the jury may find generally againſt the priſoner; for the queſtion is not *when* the fact was done, but *whether* it was done or not; and the jury ſworn *ad veritatem dicendam*, muſt find the fact, which, whenſoever it was done, deſerves the ſame puniſhment.

G. L. F. 268. 1 Hal. P. C. 361. 2 H. P. C. 179. 3 Inſt. 230.

But if the jury give a general verdict, where the felony is proved at another day than

3 that

that laid in the indictment, there the party * may falsify, for so far as any record is inconclusive and undeterminate, so far you may falsify, for thereby you do not falsify the determinations of the law, which in all laws ought to be sacred and inviolable.

* This must not be understood the party to the indictment, but his feoffee or lessee, who might otherwise be materially injured in respect to the operation of the forfeiture.

Now if a felony is alledged at such a day, and found to be done, it does not follow that it was done at the day; for if done at another day, yet the verdict and determination of the law ought to be perfectly the same; so that the *time* when the felony was done is not determined and adjusted; and, as to that, the record is inconclusive, and so far a man is at liberty to make his proofs, because the right owner thereby preserves his own property, and doth not invalidate the determination of the law, for what now comes into proof was before undetermined; but if the time when the fact was committed were found by the jury, all persons are concluded, and a forfeiture must relate thereto. G. L. E. 268.

If the indictment lays the felony at *one place*, and the evidence proves the fact done at *another place* in the *same county*, this will maintain the indictment; for all *criminal* matters were anciently tried in their proper *leet*, as all *local* actions were in the county courts; but *transitory* actions, where *time*, or *place*, is not material to the essence of the contract, or injury, are triable any where. In such cases, the party was supposed to have goods within the jurisdiction whereby he might be summoned. 1 Salk. 288. 2 Hal. P.C. 180, 291.

As to criminal proceedings, all commissions of *Oyer* and *Terminer* are made after the policy of the old law, according to the ancient juris- G. L. E. 269.

Unless enabled so to do, by act of parliament, as hath been done in some cases of high-treason, &c.

diction of the *leet*, and therefore courts constituted by such commissions, cannot try any thing where the fact arises out of the *county*, (*vide the Book of courts*) but may try all facts within the *same county*, for the *place* is but an immaterial circumstance.

2 Hal. P. C. 185. 9 Co. 67. b. 2 Inst. 319.

As time and place are immaterial circumstances, so are also the *instruments* wherewith the felony is committed; and therefore, if the indictment be for killing with a dagger, and the evidence prove a killing with a sword, rapier, hook, hatchet, bill, or any like *weapon*, with which a *wound* may be made; so if the indictment be for killing with one sort of poison, and the evidence proves a killing with another sort of poison, such evidence maintains the indictment, because the proof of the instrument wherewith the fact is done, is not absolutely necessary to the proof of the *fact* itself.

Co. Lit. 283. a.

On an indictment for murder, self-defence ought to be given in evidence, and not pleaded, because nothing can justify one private man's killing another.

2 Inst. 319. 2 Hal. P. C. 185, 291. 3 Inst. 50. 9 Co. 67.

But if a man be indicted for *poisoning*, and the proof be of *stabbing*, this evidence doth not maintain the indictment, because the proof is of a distinct and different fact, and a distinct and different sort of death; for the death that arises from outward violence, cannot be intended to be the same, with that which arises from an inward application; as a murder or homicide occasioned by an instrument, and death occasioned by poison, are of different kinds, and if the indictment states one kind, and the proof is of another kind, the fact proved is different from what is alledged; in other words, it does not support the indictment,

dictment, &c. *Facts* differ where the *actions* differ, as the *act* of *administering poison*, and the *act* of *stabbing*, are plainly distinct *actions* in the actor; but the *act* of *administering poison* is the same, whether the party gave *henbane* or *arsenic*; so the *act* of *striking* is the same, whether with a sword or with a *dagger*, and so these are not distinct *facts*.

Indictment that *A.* gave the mortal blow, that *B. C.* and *D.* were *presentes & abbettantes*, and the evidence is that *B.* gave the mortal blow, and that *A. C.* and *D.* were *presentes & abbettantes*, this maintains the indictment; for when all are present, they are all murderers, equally the same as if they themselves had actually struck; so all are reckoned to have struck, and he that actually gave the blow, is but the instrument to the rest. 2 Hal. P. C. 185, 192. 2 Hawk. P. C. 437. Plowd. 98, 100. 9 Co. 67, b. Kelyng. 334, 335. 3 Mod. 121. 2 Hal. P. C. 292.

But if two persons are indicted as *principals*, and the evidence proves one *accessary*, he must be discharged upon the indictment, because he is not proved to have done the fact, which is the crime laid in the indictment, but to have abetted the doing of it; and this distinction was first taken, when the intent to murder was not adjudged to be murder, as it had formerly been held, unless the *act* actually followed, for anciently the intent to murder made the crime, as it doth this day in *treason*, where there cannot be any accessaries. G. L. E. 271.

Formerly, if a woman was indicted for killing her bastard-child, the evidence required was, that she actually killed it, otherwise the murder was not positively proved, for the child being dead, was not positive evidence that the mother killed it; as in matters of life they required such evidence of the fact being committed, that the contrary could Hale's P. C. 8vo. 266.

not be ſuppoſed; whereas in this caſe, the child might have been ſtill-born; but becauſe mothers, to cover their ſhame, uſed to kill their baſtard children, now by the 21 *Jac.* 1. cap. 27. the very *endeavouring to conceal the death* of the baſtard-child, is evidence of murder, unleſs ſhe can contradict it by proof, and prove, at leaſt by one witneſs, that the child was ſtill-born.

1 Hawk. P. C. 77. Hal. P. C. 8vo. 266. If a man be indicted on the ſtatute of ſtabbing, 1 *Jac.* 1. *c.* 8. and the evidence is, that the dead perſon ſtruck firſt, whereby he is out of the ſtatute, yet this will maintain a general indictment for *man-ſlaughter*, as this is an indictment at common law, as well as by the ſtatute, and though the priſoner proves himſelf out of the ſtatute, yet he is not out of the charge in the indictment.

Vide 9 Co. 67. b. If upon an indictment for *murder*, it be proved that words aroſe upon a provocation, and there is proof of the fact without the circumſtances of *malice* alledged in the indictment, the jury may find him guilty of *man-ſlaughter*, which is alledged in the indictment, without the aggravation of *malice*, which makes it *murder*.

Hal. P. C. 8vo. 260, 267. 9 Co. 67. b. Indictment for murder *ex malitia praecogitata*, and the evidence is of killing without provocation; the killing an officer; or that the party was committing an unlawful act, and that death enſued to ſomebody, upon that action; if the act was deliberate, and tended to the perſonal hurt of any one, this is proof of *murder*, for in theſe caſes, the law implies the circumſtance of *malice*; this implication of law, is for the defence of its officers and of mankind; for all *malice* is a ſecret quality of the mind, and it is the fact only appears,

and

and is able to be brought to proof, and it is from the circumſtance of fact that a man muſt collect the offence of the mind; now when one man kills another, that is *prima facie* ſo ill-natured and bloody an action, that it is preſumed to be malicious, and therefore the offender, to cover himſelf from the ſuppoſition that the law has made in tenderneſs to mankind, muſt ſhew ſome *provocation*, or ſome *accident* in excuſe of the fact, and if he cannot thus mollify or excuſe the action, the ſuppoſition of law remains, and he ought to be puniſhed with death.

To the very great honor of our law, in caſes of *life*, no evidence is to be given againſt a priſoner but in his preſence. 2 L. Hawk. 607

Vide infra, What evidence maintains an indictment.

(*b.*) Of

Vid. 2 L. Hawk. 602. § 2. (*b.*) *Of the* Number *of* Witnesses *required.*

Id. 363. § 129. BY the common law no certain number of witnesses was required upon the indictment, or trial of any crime whatever.

Id. 363. § 130. By 1 *Edw.* 6. *c.* 12. no *proceedings* shall be had for *any* treason, unless the offender shall be accused by two witnesses, or shall voluntarily confess his guilt.

Id. 364. By 5 & 6 *Edw.* 6. *c.* 11. no *proceedings* shall be had for any treason, not concerning the coin, &c. unless the offender be thereof accused by two lawful accusers in person, upon his arraignment; unless he shall, without violence, confess the same.

Ibid 602. § 2. These statutes are not repealed by 1 & 2 *Phil.* & *Mary*, *c.* 10, 11. which require that all trials of treason should be according to the common law.

Id. 603. In high treasons, not concerning the coin, therefore, two witnesses to the overt act, or one witness to one, and another witness to an overt act of the same kind of treason, or to a material circumstance to prove it, were always required.

Ibid. And now by 7 *Will.* 3. *c.* 3. no person shall be indicted, tried, or attainted of high treason, whereby corruption of blood ensues, or of the misprision thereof, but upon the oaths of two lawful witnesses, either both of them to the same overt-act, or one of them to one, and the other of them to another *overt act* of the same treason, unless the party shall voluntarily confess the same in *open court.*

One witneſs to one diſtinct kind of treaſon, and another to another diſtinct kind of treaſon, are not two ſufficient witneſſes within the meaning of the act. 2 L. Hawk. 603. § 2.

A collateral fact not tending to the proof of the overt acts may be proved by one witneſs. Ibid. Note in margin.

(c.) *Whether*

Vide 2 L. Hawk. 604. (c.) *Whether* Confeſſions *may be given in Evidence.*

Ibid. THE defendant's confeſſion, whether taken before a magiſtrate on examination, or made to private perſons in diſcourſe, has always been admiſſible againſt the party confeſſing, but not againſt others. But *vide ſupra et infra, cont. per ſtat.* in caſes of high treaſon, where corruption of blood enſues, and miſpriſion of ſuch treaſon.

Ibid. (N) 1. If the confeſſion be reduced to writing, the identity of it muſt be proved, before it can be read.

Ibid. *Viva voce* evidence cannot be given of a confeſſion reduced to writing.

Ibid. (N) 2. A confeſſion obtained by the flatteries of hope, or by the impreſſions of fear, is not admiſſible.

Ibid. But any *facts* which are diſcovered in conſequence of even an extorted confeſſion, may be given in evidence.

As the ſubject of *confeſſion* is of great importance, I ſhall enlarge a little upon the ſame. The reaſon why the identity of examinations muſt be proved at the trial, is, becauſe a confeſſion, being the ſtrongeſt proof of guilt, requires the higheſt authenticity. *O. B.* 1785. p. 861. and this confeſſion muſt be proved to have been without menace or undue terror. 2 *Hale*, 285. L. Hawk. 2. V. 604. (N.) 1.

Ibid. (N.) 2. The human mind under the preſſure of calamity is eaſily ſeduced; and is liable, in the alarms of danger, to acknowledge indiſcriminately, a falſehood, or a truth, as different

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agitations may prevail. A confeſſion, therefore, whether made upon an official examination, or in diſcourſe with private perſons, which is obtained from a defendant, either by the flattery of hope, or the impreſſion of fear, however ſlightly the emotion may be implanted, is not admiſſible evidence; for the law will not ſuffer a priſoner to be made the deluded inſtrument of his own conviction.— But if any facts ariſe in conſequence of even ſuch a confeſſion, they may be given in evidence; becauſe *they* muſt ever be immutably the ſame, whether the confeſſion which diſcloſes them be true or falſe; and juſtice cannot ſuffer by their admiſſion. Vide O. B. 1786. p. 387. O. B. 1785. p. 861.

The truth of theſe contingent facts, however, muſt be proved independently of, and not connected with, or explained by the converſation or confeſſion from which they are derived. Vide O. B. 1784. p. 420. Moſs's caſe. O. B. Feb. Seſſ. 1781.

An able crown lawyer hath favored me with the following obſervation:

" The evidence of a confeſſion is not ad-
" miſſible, if obtained under a promiſe of
" favor, or by threats, ſo as to create either
" *hope*, or *fear* in the mind of the priſoner:
" but it is with this exception, that although
" the confeſſion is not admiſſible, yet the *facts*
" ariſing out of the confeſſion are admitted:
" For example, *A.* under promiſe of favor,
" confeſſes that he ſtole *B.*'s watch, and pawn-
" ed it with *C.* In conſequence of this con-
" feſſion, application is made to *C.* the
" pawnbroker, who is afterwards called as a
witneſs, and proves that he received the
" watch from *A.*"

No confeſſion of high treaſon, unleſs made in *open court*, purſuant to 7 *Will.* 3. 2 L. Hawk. 604. (N.) 3.

(vide

(vide supra.) is sufficient to authorise a conviction.

2 L. Hawk. 604. § 4. (N.) 3.

But a confession of high treason, before a magistrate upon examination, pursuant to the statutes of Edward the Sixth, *(vide supra.)* may be given in evidence on the trial by two witnesses, for any other purpose than to prove the overt-acts laid in the indictment.

Ibid. (N.) 3.

The confession in *open court* required by 7 *Will.* 3. *(Vide supra.)* is determined to mean upon the arraignment of the party.

Id. [illegible]

A confession must be taken together, and not by parcels.

(*d.*) Of

(*d.*) *Of* Depoſitions.

THE examination of an informer, taken 2 L. Hawk. 605.
on oath in purſuance of the ſtatutes of *Philip* & *Mary*, and ſubſcribed by him, may be given in evidence, on proof of its identity, and that the deponent is dead, ſick, unable to travel, or kept out of the way by the procurement of the priſoner.

This ſhews the propriety and juſtice of permitting a priſoner by himſelf, or counſel to croſs-examine any witneſs produced againſt him, before the magiſtrate, though ſome juſtices have ſtrenuouſly contended againſt the right.

A precedent may be ſeen in *L. Hawk.* of Id. 2. V. 605. (N.)
ſuch an examination being read, upon evidence that the examinant had been ſpirited away, though it did not appear to have been done by the priſoner, or by his procurement.

In petit treaſons theſe depoſitions are not Ibid.
ſufficient to convict, if the examinant be living, although he is unable to travel, or kept away by the procurement of the priſoner.

Oath that the proſecutor has vainly endea- Id. 605. § 7.
voured to produce the examinant, is not ſufficient to authorize the reading of the examinations.

Depoſitions taken *ſuper viſum corporis*, can- Id. § 8.
not be read in evidence on an appeal for the ſame death.

V. L. Hawk. 2. V. 605. f. 9. (*e.*) *Under what Circumſtances* Depoſitions *were formerly admitted to be read in Evidence.*

Ibid. EXAMINATIONS may be read in favour of a priſoner, to ſhew a variance between ſuch examinations, and the evidence given *vivâ voce*.

Id. 606. Where a witneſs at one trial varies from his own evidence at another, ſuch variance may be given in evidence, to invalidate his teſtimony at the ſecond trial.

V. Ibid. ſ. 10. *Quere* if examinations taken before magiſtrates, upon any other offence than *treaſon* or *felony*, can be read in evidence on the trial?

Ibid. ſ. 11. The written information of a witneſs, joined to another witneſs *viva voce*, are not two legal witneſſes in high-treaſon within 7 *Will.* 3.

V. Id. ſ. 12. *Quere* if the evidence of a witneſs on one trial can, on the death of ſuch witneſs, be made uſe of against a defendant on another trial?

I ſhould ſuppoſe not, becauſe the party has not the benefit of a croſs-examination.

Ibid. ſ. 13. Depoſitions taken in a *ſuit* of a different nature, and before a different kind of juriſdiction, to that which is to try the cauſe, cannot be read in evidence.

(*f*) Of

(f.) Of hearsay Evidence in Criminal Proceedings. V. 2 L. Hawk 606. f. 14.

HEARSAY can only be made use of by way of inducement or illustration to what is properly evidence. Ibid. f. 15.

But what the prisoner has been heard to say, may be given in evidence *against him.* Ibid. 607.

What a witness has been heard to say may be given in evidence, either to invalidate or confirm the testimony he gives in court. Ibid.

And the prisoner may give in evidence what he has been heard to say, from the mouths of the witnesses produced against him. Ibid. (N.)

(g.) *Of* Similitude *of* Hands.

2 L. Hawk. 607. f. 15. SIMILITUDE of hands is not legal evidence in any criminal case.

Ibid. (N.) Papers in the prisoner's hand writing, and found in his custody, may be read in evidence against him.

(*h*.) *Whether* Husband *and* Wife *can be Evidence* for *or* against *each other.*

THEY cannot give evidence *for* one another in any case, and *particularly* the one shall not be admitted to give evidence *against* the other; nor shall the examinations of the one be read against the other. 2 L. Hawk. 607. s. 16.

In cases of evident necessity, there may be exceptions to this general rule. V. Idem. 608.

Quere whether husband and wife may not be admitted to give evidence in *high treason*, against each other. V. Id. 608. (N.)

Where a husband or wife may be collaterally affected by their giving evidence against others, their testimony shall be waived. Ibid. (N.)

(i.) *What* other Perſons *are* not *excuſed from being Witneſſes.*

2 L. Hawk. 608. (N.) NO other degree of kindred or affection than *man* and *wife* will excuſe a perſon from being a witneſs.

Id. 608. ſ. 17. A *judge* or *juror* may be a witneſs; but they ſhould not afterwards be concerned in the cauſe.

Id. ſ. 18. An *accomplice* who hath confeſſed himſelf guilty of the crime, if not indicted, may be a witneſs on the trial of his confederates.

Idem. 608, 609. *Accomplices* indicted, are good witneſſes for *the King*, until convicted.

Id. 609. (N.) But the *uncorroborated* teſtimony of an accomplice is not ſufficient to convict a priſoner.

Ibid. It is in the diſcretion of the judge either to receive the evidence of an accomplice firſt, or to poſtpone it until ſome fair and unpolluted evidence be given. But the judges differ in their practice upon this point.

(*k.*) *Of other Matters respecting* Witnesses.

A Defendant in an information, against whom no evidence is given, may be sworn as a witness for others. 2 L. Hawk. 609.

A conviction, and *à fortiori*, an attainder of treason, felony, piracy, *præmunire*, perjury, forgery on 5 *Eliz.* attaint, conspiracy, or any crime for which an *infamous* punishment is inflicted, is a good cause of exception against a witness while it continues in force. Id. s. 19.

One attainted of any forgery cannot be a witness. Ibid. (N.)

But it is the infamy of the crime, and not any particular species of punishment, which destroys the competency. Ibid.

No such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court. Id. 609. s. 20.

A witness shall not be asked any question, the answer to which might accuse him of a crime. Ibid.

The credit of a witness is only to be impeached by general accounts of his character and reputation. Id. 609, 610.

Witnesses are not permitted to give evidence of their own infamy or turpitude. Id. 609. s. 20. (N.)

Outlawry in a personal action is not a good exception to a witness. Id. 610. s. 21.

A person convicted of felony, and admitted to clergy, is thereby re-enabled to be a witness. Ibid.

2 L. Hawk. 610. f. 22. A pardon of treafon or felony reftores the object of it to his credit.

Ibid. *Quære*, if a pardon will not remove difability in all cafes, where the difability is only a *confequence* of the conviction, and not an exprefs part of the judgment.

Id. 610. f. 23. A conviction of perjury doth not difable a man from making an affidavit in relation to the irregularity of a judgment. *Sed qu.?*

Ibid. f. 24. It is a good exception to a witnefs that he is either to be a *gainer* or *lofer* by the event of the caufe, whether fuch advantage be direct, and immediate, or confequential only.

Ibid. *Bail* for a defendant cannot be evidence for him without confent.

Ibid. The borrower of money upon an ufurious contract is not a competent witnefs 'till he has repaid the money. (Vide Id. b. 1. p. 533. f. 27.)

Id. 610, 611. A man who has been fraudulently deluded to fign a note, is not a competent witnefs on an information for the cheat.

Id. 611. A perfon whofe property may be prejudiced by a *forgery*, is no evidence to prove it.

Id. 611. f. 24. He againft whom a verdict is given cannot be a witnefs to prove perjury in the evidence. *Sed qu. if he has fatisfied the judgment.*

Id. 611. (N.) marg. A perfon whofe fignature is forged may be made a competent witnefs to prove the forgery, by being *releafed* from the payment.

Ibid. And if the *liability to pay* be not immediate, or apparent on the face of the in-

ftrument

ſtrument forged, the perſon whoſe name is forged, is competent to prove the forgery.

Yet if ſuch a perſon upon the *voir dire*, *conceive himſelf liable to pay*, it is a good objection to his competency. 2 L. Hawk. 611. Notes in margin.

In an indictment for aſſault and battery, the party injured is competent to prove the offence, notwithſtanding he may alſo bring his action for it. Ibid.

It is not any objection to a witneſs that he hath maintenance from the King; for every one may maintain his own witneſſes. Id. 611. ſ. 25.

Nor is it an objection *to the competency* of a witneſs, that he hath received a reward for having made a diſcovery of the crime to be proved againſt the priſoner. Ibid.

A promiſe of a pardon or other reward, on condition of giving evidence, will not deſtroy the *competency* of a witneſs, unleſs it appears that he has contracted to go beyond the truth in conſequence of it. *Sed qu.?* It muſt at leaſt go very much to his *credit*. Ibid.

An *unbeliever* was anciently thought incompetent to take an oath; but now *any perſon* may be admitted to give evidence, unleſs it appear that he *hath not any idea of God and religion*. Id. 612.

A *Gentoo* has been admitted to be ſworn according to the ceremonies of his religion *in a civil cauſe*. Ibid. (N.) 6.

A *Mahomedan* has been ſworn on the *Koran*. Ibid.

Jews are conſtantly admitted in *all cauſes* to ſwear upon the Old Teſtament; and according to the true ceremony, *with their heads covered*. Ibid.

2 L. Hawk. 612. (N.) 6. A *Covenanter* is admitted to take an oath under the ceremony *of holding up his hand.*

Ibid. By 7 & 8 *Will.* 3. *c.* 34. the affirmation of a Quaker is not admiſſible in a criminal caſe.

Caſtell, Vid. v. Bambridge, H. 3 G. 2. Stra. 854. A Quaker cannot be witneſs in an appeal, nor can his affirmation be read on a motion for an information for a miſdemeanor.

Rex v. Wych, T. 4 G. 2. Stra. 872.

Rex v. Bell, P. 11 G. 2. Andr. 30. Nor on a motion for an attachment, unleſs by conſent.

Rex v. Gardiner, H. 1 G. 3. 2 Burr. 1117. But if defendant is a Quaker, his affirmation may be read to exculpate himſelf; but a Quaker's collateral evidence in exculpation of a third perſon, when the Quaker is not charged, ſhall not be read.

Oliver v. Lawrence, H. 6 G. 2. Stra. 946. And if a rule is made to anſwer the matters in his affirmation, it ſhall be diſcharged.

Rex v. Turner, H. 18 G. 2. Stra. 1219. A Quaker's affirmation is good to prove the ſervice of a rule to ſhew cauſe why an appointment of overſeers ſhould not be quaſhed, for it is not a criminal proſecution, though on the Crown ſide, and the rule in the King's name.

2 L. Hawk 612. ſ. 27. Want of diſcretion is a good objection againſt the competency of a witneſs.

Ibid. ſ. 27. (N.) But it has been lately decided, that where an infant appears to *have diſcretion,* he may be ſworn, although he is *within the age of ſeven years.*

Ibid. ſ. 28. It is no exception to a witneſs, that he is an alien, a villein, or bondman.

Id. ſ. 28. Note in marg. A man deaf and dumb, *with whom communication can be made by means of ſigns, &c.* has been admitted to give evidence in a criminal caſe.

By

By the common law, the witnesses *for the* 2 L.Hawk. f. 29.
King were always required to be upon oath *in all cases*, but witnesses for the defendant, except in *an appeal*, or in *misdemeanors*, were never sworn.

But by 1 *Ann. c.* 9. witnesses for the Id. 613. defendant shall be sworn, and give their evidence in such manner as witnesses for the crown do.

A peer must be sworn in a criminal case. Id. (N.) 7.

It is not sufficient for a witness to say Id. 613. (N.) 8. *he thinks or persuades himself*, for the court must give judgment upon unequivocal evidence.

The court will *indulge* a prisoner by exa- Ibid. ming his witnesses apart.

A prisoner cannot call witnesses to dis- Ibid. prove what his own witnesses have sworn.

A witness cannot read his evidence, but Ibid. he may look at his notes *(taken at the time of the fact)* to refresh his memory.

In misdemeanors the defendant may, by Id. 613. f. 30. the common law, take out *subpœnas* for his witnesses, of course.

In capital cases he hath no right, by the Ibid. common law, to *subpœnas* without a special order of the court.

But by 7 *Will.* 3. *c.* 3. all persons indicted Ibid. for any *high treason*, whereby any corruption of blood may ensue, shall have the like process, as is usually granted to compel the witnesses against them:

Since 1 *Ann. (vide supra.)* it seems that Id. 613, 614. process may be taken out against witnesses, for the defendant in all cases whatsoever.

The court before whom the plea of *not* Id. 614. (N.) 9. *guilty* is to be tried, may issue compulsory process to bring in the witnesses.

The

2 L.Hawk. 614. (N.) 9. The uſual way is for the juſtices or coroner, on the examination, to bind them over, &c.

Idem. 614. A witneſs in execution for debt, may be brought up to give evidence upon a *habeas corpus*.

(*l.*) *What*

(*I.*) *What* Evidence *maintains an Indictment*.

WHERE a person is indicted upon *a statute*, and the evidence doth not bring the case within the statute, but yet proves the offence in the indictment, as it is an offence at the common law, the defendant may be found guilty at *common law*, and the words *contra formam statuti* rejected as surplusage. 2 L. Hawk. 614. s. 31. & 356.

A prisoner cannot be found guilty *as principal* upon evidence, which only proves him to have been *accessary before the fact*. Ibid. & 464.

The *day* laid is not material upon evidence: the defendant may be convicted on evidence of the fact at any other day, either before or after that which is laid. Id. 614. s. 32.

But the offence must be proved to have happened before the time when the indictment was preferred. Ibid.

According to the evidence given, the jury may either find generally guilty, or they may find the particular time when the fact was committed, &c. Ibid. s. 33.

Where the time proved varies from that laid in the indictment or appeal, the jury may either find the defendant guilty generally, in which case a forfeiture shall relate to the time laid, 'till the verdict be falsified by the party interested (as it may be in this respect, though not as to the point of the offence) Id.

or

or they may specially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which case the forfeiture shall relate to the day so specially found.

2 L. Hawk. 615. s. 34. *The place* where the offence is laid to be committed *is material*; the least variation in the evidence of it is fatal.

Ibid. But a place laid only for a *venue* is no way material upon evidence.

Ibid. Evidence must be given that the crime was committed in the same *county*, as laid in the indictment.

I conceive that where a horse, *&c.* is stolen in one county, and found in the possession of the prisoner in another county, the offender may be indicted in the latter county, and evidence of the property being in his possession in that county, will maintain the indictment.

2 L. Hawk. 615. After a crime hath been proved in the *county laid*, evidence may be given of facts *in another county*.

Ibid. In treason, where a *levying of war is an overt act* of the treason, and it is proved in the county laid by *one witness*, evidence of levying war in another county may be proved by another witness.

Ibid. But where the *levying of war* is the treason for which the party is indicted, it must be proved *in the county* where it is laid.

Ibid. *The levying of war* cannot *at this day* be given in evidence as *an overt-act*, but only in the county in which it is laid, unless it tend to prove some other overt-act that is laid.

For

For by 7 *Will.* 3. *c.* 3. no evidence ſhall be given of any overt-act, not laid in the indictment. 2 Hawk. 615.

No evidence ſhall be admitted in high treaſon, but what is immediately *relevant* to the overt-act laid in the indictment; and no other evidence tending to prove *the ſame ſpecies of treaſon* as is laid, ſhall be given. Id. 615, 616.

But every thing incidental to the overt-act laid, may be given in evidence; as where the treaſon is the *King's death*, and the overt-act, *a conſult and agreement for aſſaſſination*; here a liſt of the conſpirators may be given in evidence. Ibid. 616.

So alſo in *compaſſing the King's death*, and letters to that purpoſe, the purport of which only are laid, the particular letters tending to prove the overt-act may be read. Ibid.

Where ſeveral overt-acts of treaſon are laid, proof of any one of them is ſufficient. Idem. 616. ſ. 35.

Where an inſtrument *ſecundum tenorem ſequentem* is ſet out in an indictment, any, the leaſt variance between the inſtrument recited, and that given in evidence, is fatal. Id. ſ. 36.

But where *the ſubſtance* only is ſet forth, it is ſufficient *if the ſenſe* of what is ſo ſet forth be proved. Ibid.

Evidence that the defendant ſaid *ſo and ſo*, is no evidence, for the court muſt know the words to judge of their force and effect. Ibid.

In homicide *the inſtrumental cauſe* of the death need not be ſpecifically proved. Evidence that the party died by the *ſame kind of death* as that laid is ſufficient. Id. 617. ſ. 37.

Where a variance between the evidence and the indictment is fatal as to the principal, it is equally fatal as to the acceſſary. Id. ſ. 38.

2 L. Hawk. 617. ſ. 39. If ſeveral are indicted, and ſome charged as principals, and others as abettors, evidence that thoſe who are charged as abettors *did the fact*, will maintain the indictment.

Ibid. ſ. 40. If one be indicted as acceſſary to two, and upon evidence he appear to have been acceſſary to one of them only, yet he ſhall be found guilty.

Id. 618. ſ. 41. If a perſon be indicted of murder, *ex malitia precogitata*, and only *malice implied by law* be proved, yet he ſhall be found guilty.

Ibid. Where an indictment ſets forth the ſpecial matter from which the law implies malice, a variation in the evidence as to the circumſtance is immaterial.

Id. 618. ſ. 42. Violent preſumption from plain circumſtances, is in ſome caſes taken for *full proof*, as where a man is ſtabbed in an houſe, and another runs out with a bloody knife in his hand, and no one elſe is in the houſe at the time.

Ibid. *Probable preſumption* may be of ſome weight; but *ſlight preſumption* ought not to be regarded at all.

Id. ſ. 43. By 21 *Jac.* 1. *c.* 27. if any woman be delivered of a child, (which if born alive would be a baſtard) and endeavour to conceal by drowning, &c. whether it were born alive or not, ſuch endeavour ſhall be evidence of murder, unleſs the mother can prove by one witneſs that the child was born dead. As to the form of the indictment, *vide* 2 *L. Hawk.* 618. *ſ.* 43.

Ibid. The ſtatute does not create any new offence, but only makes ſuch concealment an undeniable evidence of murder.

But it is uſual for the court to expect evidence that the child was born alive, &c. 2 L. Hawk. 619.

On an indictment on a penal ſtatute, a defendant may give in evidence any exception in his favour in the body, or the *proviſo* of the act. Ibid.

But he cannot give in evidence any clauſe of exemption in a later ſtatute; but ought to plead it. Ibid.

The very beſt evidence that the nature of the thing will bear, muſt in all caſes be given. Ibid. ſ. 45.

A copy of a record is admitted where the record itſelf cannot be had, but a copy of a copy is not admiſſible. Ibid.

In *murder*, the declarations of the deceaſed, after the mortal wound given, and while he is ſenſible of approaching diſſolution, may be given in evidence. Ibid. ſ. 46.

On an indictment for clipping and counterfeiting the King's coin, it is not neceſſary to prove it the King's coin by proclamation; but, as a queſtion of fact, it muſt be left to the jury upon all the circumſtances; and if it be not commonly known, the moſt that can be expected is, that the indenture of the officers of the Mint ſhould be produced to prove the currency of it. Id. 619. ſ. 47.

But on an indictment for the counterfeiting, clipping or diminiſhing *foreign coin* on the firſt of *Mary*, *ch.* 6. or the 5th or 18th of *Eliz.* for high treaſon, a proclamation with a proclamation writ under the great ſeal, ſeems neceſſary to be produced. Id. 620. ſ. 48.

[D.] (*a.*) Of

[D.] (*a.*) *Of a* DEMURRER TO EVIDENCE, *and other* DEMURRERS, *&c. at* NISI PRIUS.

B. N. P. 113. Co. Lit. 72. a. 5 Co. 104. a. * R. 5 Co. 104. a. Baker. Vide infra.

IF the plaintiff or defendant give in evidence matter of record, or writings, or parol * evidence on which a doubt in law arises, the other side may demur to the evidence; otherwise if there be a doubt, whether the fact be well proved, for the jury may find it on their own knowledge. He that demurs to evidence admits it to be true, and if the matter of fact be uncertainly alledged, or it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, so that the truth of the fact as well as the validity of evidence be referred to the court; he that alledges this matter cannot join in demurrer, but ought to pray judgment of the court, that his adversary may not be admitted to his demurrer, unless he will confess the matter of fact to be true; and if he do not so do, but join in demurrer, he has likewise misbehaved, and the court cannot proceed to judgment, but a *venire de novo* shall go.

5 Co. 104. 1 Lev. 87. Aleyn, 18.

Terry v. Westmore, at Maidstone, 1682, per Pemberton Ch. J. Co. L. 72.

Where there is a demurrer to evidence, the judge orders the associate to take a note of the testimony, and that is signed by the counsel on both sides, and the demurrer is affixed to the *postea*.

5 Co. 104. a.

If one demur properly, the other ought to join, except it be in an information at the suit of the King, or other suit by him; *a fortiori* the King himself need not, as in a

quare

quare impedit, but the judge muſt direct the jury to find the matter ſpecially. *Vide infra.*

In *aſſumpſit* to prove a conſideration, an arreſt was to be proved by the plaintiff, and for that he did not produce the writ, the defendant demurred; and it was agreed by the court that the writ ought to have been produced, but by the demurrer it is confeſſed; the arreſt being matter of fact, though to be proved by matter of record; and the jury might of their own knowledge know there was a writ; and by the demurrer all matters of fact are confeſſed that the jury could know of their own conuſance. *Vide infra.* 1 Lev. 87.

On a demurrer to evidence, the only queſtion for the conſideration of the court is, whether the evidence given be ſuch as ought to be left to the jury in ſupport of the iſſue joined; and no objection can be made to the declaration or other pleadings in that ſtage of the cauſe. The judgment on ſuch a demurrer is, that the evidence is, or is not ſufficient to maintain the iſſue joined. Cockſedge v. Fanſhaw. Eaſt. 19th Geo. 3. B. R. Affirmed in Dom. Proc. Cort v. Birbeck, Hill. 19. Geo. 3. B. R. Aſh. Ent. 194.

On a demurrer to evidence the moſt uſual courſe is to diſcharge the jury without more inquiry, (though they may find damages conditionally) and for a writ of inquiry to be executed afterwards. Salk. 284. Cro. Car. 143. L. Ray. 6c. 2 Ro. 119. Plo. Com. 408. Per Mont. Ch. B. 1682.

But if the matter of law be clear, the court need not admit a demurrer. If the judge admit that for evidence, which is not, the party cannot demur for that cauſe, but muſt tender a *bill* of *exceptions*. *Vide infra.* R. 2 Roll. 119.

N. B. If the jury find damages conditionally, it is according to the form of a ſpecial verdict. *Vide* precedents annexed to *Trials per Pais.*

Pl. Com. 4. In an information the King may demur to evidence given for the defendant. *Vide supra.*

Hard. 112. If at *nisi prius* the defendant pleads a plea *after the last continuance*, the plaintiff may demur to it. When and how he shall plead it. *Vide* 1 *Com. Dig. Tit. Abatement*, (I. 24.)

Hard. 112. If there be a challenge to an array, the other party may demur.

Hard. 112. A demurrer to a challenge may be determined at *nisi prius*. But a demurrer to a plea *after the last continuance* shall be adjourned.

Hard. 1.. Co. Lit. 72. a. Cro. El. 751. 5 Co. 104. a. R. All. 18. Pl. Com. 411. a. R. Al. 18. As where a man demurs upon evidence, he must admit the evidence to be true: therefore, if he demurs for that the evidence is not sufficient, and besides says also, that there is no such writ as was offered in evidence, and so refers the fact as well as the law to the court, an *alias venire facias* shall go; for the court cannot proceed to judgment.

Co. Lit. 72. a. R. 5 Co. 104. a. Cro. El. 751, 752. If a man demurs upon the evidence, the other party must join in the demurrer, or otherwise must waive the evidence, if the evidence be matter of record, or in writing,

Cro. Eliz. 752. If one will demur upon the evidence given by witnesses, the other need not join; for the credit of the witnesses may be referred to the jury.

(*b*). The

(*b*.) The following FORM of a *Demurrer* to *Evidence* and *Joinder* thereto, may perhaps be found useful at an assizes. B. N. P. 314.

" AFterwards, on the day, and at the place " within contained, before *Sir Richard* " *Adams*, knight, one of the barons of our " Lord the King, of his Court of *Exchequer* " at *Westminster*, Sir *Richard Aston*, knight, " one of the justices of our said Lord the " King, assigned to hold pleas in the court " of our said Lord the King, before the " King himself, and others their fellows, jus- " tices of our said Lord the King, assigned " to take the assizes in and for the city of " W —— in the county of the same city, " according to the form of the statute, &c. " come as well the within named *Charles* " *Withers*, Esq. as the within named *George* " *Wingfield*, Esq. by their attornies within " named: and the jurors of the jury, whereof " mention is within made, that is to say " *R. L. &c.* being called, likewise come, and " being chosen, tried, and sworn to say the " truth of the premisses within contained; " as to the first issue between the parties " within joined, say, that the said *George* " *Wingfield* is guilty of the trespass within " complained of, in manner and form as " the said *Charles Withers* hath within com- " plained; and they assess the damages of " the said *Charles Withers*, by reason thereof " to sixpence. And as to the issue lastly

Withers, Esq. v Wingfield, Esq.,

"within joined between the parties, the said "*George Wingfield* shews in evidence to the jury aforesaid, to prove and maintain the "issue lastly within joined on his part, by "one witness, that (state the evidence) And "the said *Charles Withers* says, that the "aforesaid matter to the said jurors, in form "aforesaid shewn in evidence by the said "*George Wingfield*, is not sufficient in law "to maintain the said issue, lastly within "joined, on the part of the said *George* "*Wingfield*; and that he the said *Charles* "*Withers*, to the matter aforesaid, in form "aforesaid shewn in evidence, hath not any "necessity, nor is he obliged by the law of "the land to answer; and this he is ready "to verify; wherefore for want of sufficient "matter in that behalf, shewn in evidence "to the jury aforesaid, the said *Charles* "*Withers* prays judgment, and that the "jury aforesaid may be discharged from "giving any verdict upon the said issue; "and that his damages, by reason of the "trespass within complained of, may be ad-"judged to him, &c.

Joinder in Demurrer.

"And the said *George Wingfield*, for that "he hath shewn in evidence to the jury "aforesaid, sufficient matter to maintain the "issue lastly within joined, on the part of "him the said *George Wingfield*, and which "he is ready to verify; and for as much as "the said *Charles Withers* doth not deny, "nor in any manner answer the said matter, "prays judgment, and that the said *Charles* *Withers* may be barred from having his "aforesaid action against him the said *George* "*Wingfield*, and that the jury aforesaid may "be

" be discharged from giving their verdict
" upon the issue lastly joined, *&c.*

" Wherefore let the jury aforesaid be dis-
" charged by the court here, by the assent of
" the parties, from giving any verdict there-
" upon."

The following is a *modern case* of a *demurrer* to *evidence*, which we have thought advisable to give with the arguments of counsel, and the opinion of the court at length.

(c.) *A Modern Case upon a Demurrer to Evidence.*

Smith and another assignees of Clarke a bankrupt, against Milles. M. 27. G. 3. B. R. Durnf. & East. IV. 475. Trespass will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. Whether proof of a debt of 16 l. to one of the petitioning creditors, there being more than three, will support the commission of bankrupt. Qu.?

THIS was an action of trespass brought by the assignees of a bankrupt against the defendant, who was sheriff of the county of *Hertford*.

The first count in the declaration was for breaking and entering the messuages, *&c.* of the plaintiffs as assignees, on the 23d *Feb.* 1786, and seizing and taking the deeds and writings, household furniture, &c. (enumerating them particularly) of the assignees.

The 2d count was for seizing and taking the goods, &c. of the plaintiffs on the 13th of *March*, 1786.

The defendant pleaded, 1st. The general issue; and 2dly, a justification under a *fieri facias*, sued out on the 13th of *February*, 1786, at the suit of one *Caleb Atkinson*, against the bankrupt, and delivered to him on the 21st of *February*, 1786, to be executed.

Replication *de injuriâ suâ propriâ absque tali causâ*.

This cause came on to be tried at the last assizes for the county of *Hertford*, before Lord *Loughborough*, when the plaintiffs proved a com-

commiſſion of bankrupt dated the 27th of *February*, 1786, againſt *Clarke*, on the petition of more than three creditors, and that the bankrupt, at the time of iſſuing the commiſſion, was indebted to one of them in the ſum of 161 *l*. They then proved the trading, and an act of bankruptcy on the 1ſt of *February*, 1786. They alſo proved that on the 23d of *February*, 1786, and not before, the defendant, as ſheriff of *Hertford*, entered the dwelling-houſe of the bankrupt, and there ſeized the ſeveral goods, &c. of the bankrupt under and by virtne of the ſaid writ of *fieri facias*; that on the 28th of the ſame month of *February*, *Clarke* was declared a bankrupt, on which day the commiſſioners executed a proviſional aſſignment of the bankrupt's eſtate and effects to their meſſenger, whereof the officer in poſſeſſion under the execution on the ſame day had notice, that on the 13th, 14th, 15th, and 16th days of *March*, the ſaid goods and chattels were ſold by public auction under the aforeſaid execution; that on the morning of the ſaid 13th day of *March*, the ſaid ſheriff had notice from the aforeſaid proviſional aſſignee not to ſell, that on the 17th of *March* the plaintiffs were choſen aſſignees, &c. of the bankrupt under the ſaid commiſſion, and that an aſſignment thereof was then duly made to them.

To this *evidence* the defendant *demurred*.

Ruſſel, in ſupport of the demurrer, before he came to the principal point in this caſe, obſerved that this commiſſion was ſued out by more than three creditors, who ſhould have proved a debt to the amount of 200 *l*. in order to ſupport it; for though the debt which was proved by one creditor was ſuffi-

 cient

cient to have supported a commission, which might have been sued out on the petition of such creditor, yet the debt proved in the present case, did not support the commission as taken out.

But laying that entirely out of the case, the principal question is whether *trespass* will lie at the suit of the assignees against the sheriff, who entered and seized the bankrupt's goods before the commission, but who sold them afterwards?

To support this action, the plaintiffs must prove that the defendant has been guilty of an unlawful entry, and taking of the plaintiff's goods; but this was not an unlawful entry, and taking at the time, because *Clarke* was not then a bankrupt, and it could not be known at that time, whether he would ever be declared a bankrupt. Then it must be contended that the subsequent sale made him a trespasser by relation. This entry was not a *trespass*, though his sale may be a *conversion*, and subject him to an action of *trover*.

The distinction between actions of *trover* and *trespass* is fully taken in the case of *Cooper* and another v. *Chitty* and another (*a*), in which case Lord *Mansfield* said, that to subject a sheriff to an action of trespass, the *taking* must be unlawful, and that persons who acted innocently could not be made trespassers, or criminal by relation. In the present case these are only the goods of the plaintiffs by relation. They may become their *property by relation*; but *possession* cannot have *relation* back, and *possession* is essentially necessary to support this action. A fiction of law may give a *right*, but cannot create a *wrong*. Therefore the taking was not unlawful,

(a) 1 Burr. 20. 1 Bl. Rep. 65.

ful, neither is it true that the defendant took the goods of the *plaintiffs*, for they were not chosen assignees 'till after the seizure.

He admitted that the sale subsequent to the notice was wrong, and subjected the defendant to an action of *trover*, but not *trespass*.

This is not like any of those cases, where persons have been deemed trespassers *ab initio*, by doing some act inconsistent with the original taking, as by working a distress (a), &c. for this sale is not inconsistent with the original taking: it is not an abuse of the authority of the law under which the defendant acted, and it is only by some collateral matter, that the sale became unlawful.

(a.) Vide Oxley and Watts. Durn & East. 1 V. 12. and the cases there cited.

But, however, if the selling be considered as a trespass, so as to render the defendant a trespasser *ab initio*, there should have been a new assignment.

Shepherd, *contra*, was not aware that the first point was intended to be gone into, and said, he only came prepared to discuss the general question, whether the action of *trespass* was properly brought? insisting, however, that the debt which had been proved was sufficient to support the commission.

He contended, as to the principal point, that if there was not a sufficient property, or possession, in the assignees, to enable them to maintain *trespass*, there never could be a sufficient property or possession to enable any person to bring trespass, where a wrong doer had got possession. The provisional assignment of the bankrupt's effects, which was made previous to the sale, was meant purposely to protect the goods, 'till the assignees were chosen; and the subsequent assignment

vested

vested the property in the assignees by relation, and gave a right co-eval with the provisional assignment.

Wherever there is a general property in personalty, though the party has not got possession, an action of *trespass* will lie.

An executor after proving the will, may maintain *trespass* for taking the testator's goods before probate, of which he was never in possession (*b*). If a lord be entitled to a waif, or estray, within his manor by prescription, he may maintain *trespass*, against a stranger without seizure (*c*). *Trespass* will lie against a stranger by a person having a general property in personalty, without possession; because, in law, the property draws a possession after it (*d*). If the assignees cannot maintain this action, because they had not the actual possession, no person can; for the bankrupt himself cannot bring the action after bankruptcy. Therefore no tortious taking of a bankrupt's effects, after the bankruptcy, and before the choice of assignees, can be punished.

(*b*) 2 Bulst. 268.

(*c*) F. N. B. 91.

(*d*) Bro. Tit. Trespass, pl. 303.

He admitted that where a sheriff sells, after an act of bankruptcy committed, without notice, he is not subject to an action of *trespass*; but if he sells after notice, he assents to the original *trespass*; and makes himself a trespasser *ab initio*. Where a distress is taken for damage feasant, and the party afterwards abuses that distress, yet he is deemed a trespasser *ab initio*, although the first taking were lawful. So in the present case, the sheriff took possession *innocently* at first, though not *legally*, because the goods were vested in the assignees by relation from the time of the act of bankruptcy committed: yet his selling

the goods after notice, rendered him a treſpaſſer *ab initio*. If it were not ſo, a ſheriff would be in a better ſituation than any other wrong-doer. According to the caſe of *Cooper v. Chitty*, the diſtinction is between thoſe caſes where the ſheriff acts innocently throughout, and where he acts wrongfully after notice.

But if the defendant be not a treſpaſſer by relation, yet this evidence will, at all events, ſupport the ſecond count, which is a general count for taking the plaintiff's goods. It appears that the ſale was after notice.

Now every continuation of a treſpaſs is conſidered as a new treſpaſs. *Dyer* 320. Though the party is not obliged to bring ſeveral actions of treſpaſs, where he might have brought one with a *continuando*; yet he may if he pleaſe. 2 *Ro. Abr.* 545. *A pl.* 1.

In treſpaſs for taking goods, every day's taking is a new treſpaſs, 1 *Keb.* 279. Here, though the ſheriff was not guilty of a treſpaſs by relation, yet in the ſecond count, there is a different ſubſtantive charge, for which there is no juſtification. In Bull. N. P. (*a*) it is ſaid, that the purpoſe of laying two counts in a declaration is, to avoid a new aſſignment, ſo that the defendant is under the neceſſity of pleading the general iſſue to one of them. The ſecond count, therefore, in the preſent caſe contains a ſubſtantive charge of treſpaſs, and avoids the neceſſity of a new aſſignment.

(*a*) B. N. P. 17.

Ruſſell, in reply.—As to the caſes of executors bringing actions for goods taken in their teſtator's life-time; that is under the ſtatute *de bonis aſportatis*, which ſhews that at common law it was otherwiſe.

This

This is not like the case of a person taking a waif, wreck, or estray, for there he takes, without any colour of right, and is a wrong-doer in the first instance.

Besides, those things being appurtenant to a manor, the owner thereof is considered as in possession.

The sale *after notice* will not render the defendant in this case a trespasser by relation; because, though he had notice from the assignee, the commission might have been superseded. And the notice did not come from the party at whose suit the sheriff was in possession under the execution; but from a third person: and if the commission had been superseded, the sheriff would have been liable to an action by the party at whose suit the execution was taken out.

As to the unlawful possession of the sheriff; Lord *Mansfield* said, in *Cooper* v. *Chitty*, "to "support the act of taking it is not lawful: "but to excuse the mistake of the sheriff "through unavoidable ignorance, it is law-"ful."

A sheriff ought to be better protected than any other wrong-doer; for he is compelled to do his duty, and does not act from his own choice.

The necessity of the new assignment is not waived by the second count, because the plaintiffs have not proved *two* trespasses.

He admitted, that every continuation of a trespass was a new trespass: but that is assuming that the first taking was a trespass, which is denied in the present case. For if the sheriff had abandoned the possession immediately after the notice of the bankruptcy, he certainly would

not

not have been liable to an action of trespass for the first taking.

Ashurst, J.—We will consider this question; but it seems to me that it is very like the case of *Cooper* and *Chitty*.

Buller, J.—The second count does not in all cases avoid the necessity of a new assignment. The general use of adding the second count is this; the first charges an *injury done to the land, and taking the goods there*; that is in its nature local, and must be proved where laid. Then the reason, and almost the only one, of adding the second count is, in order to avoid the locality: it is for taking goods *generally*. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere. There cannot be a new assignment but where there is a special plea. And if the case be such that, on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty.

Cur. adv. vult.

Ashurst, J.—now delivered the opinion of the court.

It might perhaps have sufficed for us to say, that the point now in question has been solemnly determined in this court, in the case of *Cooper* against *Citty*, upon full and mature deliberation, by a full court. And for that reason, whatsoever our opinions might have been (as we are now only two judges sitting in court) it would not have been very decent in us to have over-ruled the authority of that case. But we are relieved from any difficulty on that account, as our opinion entirely coincides with that of the judges in the above case.

To entitle a man to bring *trespass*, he must, *at the time* when the act was done, which constitutes the trespass, either have the *actual possession* in him of the thing, which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him.

Such is the case cited at the bar, of an action of trespass for an estray, or wreck, taken by a stranger before seizure by the lord; for the *right* is in the lord, and a *constructive possession* in respect of the thing being within the manor of which he is lord.

So the executor has the *right* immediately on the death of the testator, and the right draws after it a *constructive possession*. The probate is a mere ceremony, but when passed, the executor does not derive his title under the probate, but under the will: the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, *&c.* before probate.

But there is no instance that I know of, where a man who has a *new* right given him, which from reasons of policy is so far made to relate back, as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring *trespass* for an act done before such right was given to him.

But at all events the rule will hold with respect to officers and ministers of justice (*a*).

In the case of *Lechmere* v. *Thoroughgood*, (*b*) which was an action of trespass brought by the assignees of bankrupts against a sheriff's officer, who took goods under an extent, the act of bankruptcy was on the 28th of *April*; afterwards the sheriff's officer took the goods under an extent, and afterwards an assignment was made

(*a*) Vide 2 Ro. Ab. Title Trespass. G. 6.

(*b*) 1 Show. 12.

made to the plaintiffs, who brought *treſpaſs*; and it was held the action lay not; and the argument turned on this, that the officers ſhall not be made treſpaſſers by relation: the ſame doctrine is recognized in the caſe of *Baily* and *Bunning*.

Now here the execution was fully completed, and the goods ſold, before the aſſignment to the plaintiffs. In the caſe of *Cooper* and *Chitty*, Lord *Mansfield* lays down the true ground of diſtinction between the action of *trover* and the action of *treſpaſs*, as applied to this caſe; "The action of *trover*," (he ſays) "is maintainable, becauſe the converſion, and "not the taking, is the gift of the action; and "the ſale was after the act of bankruptcy was "notorious. But," (he ſays) "that though "the property by relation was in the aſſignees "from the time of the act of bankruptcy, yet "the taking by the ſheriff, as applied to this "ſpecies of action, was lawful."

And he ſays "the ſeeming contrariety and "confuſion in the caſes ariſes from the equi- "vocal uſe of the word *lawful*. For," (ſays he) "to ſupport the act, it is not lawful; but "to excuſe the miſtake of the ſheriff it is law- "ful; or in other words the relation intro- "duced by the ſtatutes binds the property; "but men, who act innocently at the time, "are not made criminal by relation, and "therefore are excuſeable from being puniſh- "able by indictment or action as treſpaſſers. "But as a ground to ſupport a wrongful con- "verſion by a ſale after a commiſſion pub- "licly taken out and an actual aſſignment "made, it was not lawful."

The plaintiffs therefore are not injured, as it is competent to them to recover the *value*

of

of the goods by bringing a proper action, namely an action of *trover*.

But the officer shall not be harassed by this species of action, in which the jury *might* give vindictive damages.

There is likewise another point made, namely, that the petitioning creditors (being more than three in number) have not proved a debt to such an amount as the statute requires; not having in the whole proved a debt to the amount of 200 l. though one of them had proved a debt to the amount of 161 l. The words of the statute of 5 *Geo.* 2. *c.* 30. are, "that no commission of bankrupt shall be "awarded and issued out against any person "upon the petition of one or more creditors, "unless the single debt of the creditor do "amount to 100 l. or upwards, or unless the "debt of two creditors so petitioning as aforesaid shall amount to 150 l. or upwards; or unless the debt of three or more creditors, so petitioning, shall amount to 200 l. or upwards." Now had the commission stood upon the petition of that one only, whose debt amounted to 161 l. it would clearly have been good: but as they have chosen to take it out in the names of more, the question is, whether they have not laid themselves under the necessity of complying with the words of the statute, which in such case requires the debt proved to be 200 l.

This might perhaps deserve some consideration: but however we give no opinion upon it, as we are clear against the plaintiffs on the other point.

Therefore, on the whole, the judgment must be for the defendant.

Postea to be delivered to the defendant.

[E.]

[E.] (*a*). *Of* Bills *of* Exceptions.

BY Weftminfter 2. (13 *E.* 1. *c.* 31.) it is enacted, that if one impleaded before any of the juftices, alledge an exception, praying that the juftices will allow it, and if they will not, if he write the exception, and require the juftices to put their feals for a witnefs, the juftices fhall fo do, and if one will not, another of the company fhall. And if the King, on complaint made of the juftices, caufe the record to come before him, and the exception be not found in the roll, on fhewing it written, with the feal of a juftice put to, the juftice fhall be commanded that he appear at a day, either to confefs or deny his feal. And if the juftice cannot deny his feal, they fhall proceed to judgment, according to the fame exception, as it ought to be allowed or difallowed. Reg. 182.

The bill of exceptions muft be tendered at the trial. The nature and reafon of the thing requires the exception fhould be reduced into writing when taken and difallowed, like a fpecial verdict, or a demurrer to evidence, not that they need to be drawn up in form, but the fubftance muft be reduced into writing while the thing is tranfacting. If a judge allow the matter to be evidence, but not conclufive, and fo refer it to the jury, no bill of exception will lie; as if a man produce the probate of a will to prove the devife of a term for years, and the judge leave it to the jury, but he may have an attaint againft the jury if they find againft the will. Salk. 288. Sir T. Raym. 405.

Bridgman and Holt. Sho. Par. Ca. 120. A bill of exception ought to be upon some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon fact not denied, in which either party is over-ruled by the court: if such bill be tendered, and the exceptions in it are truly stated, then the judges ought to set their seal in testimony that such exceptions were taken at the trial; but if the bill contain matters false or untruly stated, or matters wherein they were not over-ruled, they are not obliged to affix the seal.

B. N. P. 316. A bill of exceptions is not to draw the whole matter into examination again, it is only for a single point, and the truth of it can never be doubted after the bill is sealed, for the adverse party is concluded from averring the contrary, or supplying an omission in it.

2 Inst. 426. B. N. P. 316. Cites Bridgman and Holt. v. ante. If the judges refuse to sign the bill, the party grieved by the denial may have a writ upon the statute, commanding the same to be done *juxta formam statuti*: it recites the form of an exception taken and over-ruled, and it follows *vobis præcipimus quod si ita est, tunc sigilla vestra apponatis*; and if it be returned *quod non ita est*, an action will lie for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given, and upon such a recovery, a peremptory writ commanding the same.

1 Lev. 68. * S. T. T. R. 1 V. Fo. 938. 2 L. Hawk. 602. In *Sir H. Vane*'s case,* (who was indicted for high-treason) the court refused to sign a bill of exceptions, because they said criminal cases were not within the statute, but only actions between party and party.

But in 1 *Leon.* 5. it was allowed in an indictment for a trespass, and in 1 *Vent.* 366. in an information in nature of a *quo warranto*.

In

In 2 *L. Hawk.* 602. *N.* it is obſerved that in Sir *H. Vane*'s caſe, it is ſaid that ſuch bill never was nor ought to be allowed in any *capital* caſe, and as this caſe is reported in 1 *Sid.* 85. 1 *Keble*, 384. it ſeems to have been holden that it is not grantable on any indictment; and as it is reported in 1 *Lev.* 68. and *Kelynge*, 15. that it is not grantable in any criminal caſe whatſoever. *Vide* 2 *Inſt.* 427.

A bill of exceptions is only to be made uſe of upon a writ of error, and therefore where a writ of error will not lie, there can be no bill of exceptions. B. N. P. 316. Rex v. Inhabitants of Preſton. Hill. E. 9. G. 2.

In the caſe of *Preſton upon the Hill*, and *Dareſbury*, *E.* 9 *Geo.* 2. *B. R. Burr. Sett. caſ.* 77. After argument on both ſides, the court were unanimouſly of opinion that a bill of exceptions doth not lie to the quarter ſeſſions.

Though *ex rigore juris* the party ſhall not have advantage of his bill of exceptions, but on a writ of error; yet where the action has been brought in the court of *K. B.* that court, to prevent delay and expence, has ſometimes examined the matter before judgment. B. N. P. 316. 19 H. 8, 24, 25. Lev. 236.

If a judge at a trial does erroneouſly over-rule a matter offered in evidence, the regular way is to tender a bill of exception; yet if upon ſuch a matter, the party will ſuffer the trial to go againſt him, it is good cauſe of a new trial. Per Cur. M. 1 Ann. B.R. 7 Mod. 53. Bill of Exceptions. New Trial.

In an action of replevin for taking the plaintiff's cattle at *Ochorbir*, the defendants in their cognizance ſtated that the *locus in quo* had been immemorially part and parcel of a certain tenement of land called *Bulchyſtullen* Davies againſt Pierce and others. T. 27 G. 3. B. R. Durnf. & Eaſt. 2 V. 53. Declarations by tenants are ad-

 ſheep-

missible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof, that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive.

sheep-walk, of which *Benjamin Holloway* and others before, &c. were seised in their demesne as of fee, and then stated a demise to *T. Hugh* for a year, and so from year to year, as whose bailiffs they acknowledged taking the cattle, *&c.* as a distress for damage feasant: in the second cognizance they derived a title to *T. Hugh* from *Margaret Pryce* of the same premisses, and acknowledged, &c. as her bailiffs. The pleas in bar traversed the *locus in quo* being part and parcel of the said tenement of land called *Bulchystullen*; on which issues were taken in the replication.

This cause was tried at the last spring great sessions at *Cardigan*, before Mr. *Beard*, when, after the evidence on the part of the defendant was closed, the plaintiff's counsel offered to prove in evidence, "that *Hugh John Griffiths*, and *John Griffiths*, his father, who were respectively tenants of *Bulchystullen* and *Llyast Nant glass*, of which *Ochorhir* is a part, both deceased, did respectively, while in the occupation of the premisses, declare that they rented *Llyast Nant glass* of one *Matthew Evans*, who was never the owner of *Bulchystallen*, which has for a long time belonged to the family of *Price*; that *H. J. Griffiths* declared he paid the same *M. Evans* five shillings yearly, and a quarter of mutton, for the said *Llyast Nant Glass*; that he declared he was then going to pay the said rent to the said *John Evans*, for the said *Llyast Nant Glass*; that he ordered his servant to herd some cattle at *Llyast Nant Glass*, saying he could not otherwise afford to pay *M. Evans* his rent; that *John Griffiths* prevented a certain person from cutting rushes on *Lyast Nant Glass*, and threatened that he would tell *M. Evans*, his landlord,

landlord, of his cutting the ſaid ruſhes, and once took the ruſhes from the ſaid perſon, and told him they belonged to *M. Evans*; that about 40 years ago one *Thomas Hugh* rented *Llyaſt Nant Glaſs* for one year, and declared that he paid rent either to *M. Evans*, or his mother."

The defendant's counſel objecting to the admiſſibility of this evidence, the learned judge refuſed to admit it, and the jury gave a verdict for the defendants: whereupon the plaintiff's counſel excepted to the judge's opinion, and tendered a bill of exceptions to him, which he ſigned.

The proceedings were brought here by a writ of error, and in the laſt term Mr. *Beard* appeared in this court, and acknowledged his ſeal, to the bill of exceptions.

This queſtion was to have been argued by *Bragge* for the plaintiff, and *Williams* for the defendant; but

The court were clearly of opinion, that the evidence was admiſſible; and

Ashhurst, J. ſaid, that the fact of cutting the ruſhes was deciſive; and

Buller, J. added, that the other queſtion relative to the tenant's declaring that he paid rent for the premiſſes in queſtion, had been determined in the caſes of *Holloway* v. *Rakes*,(a) and *Doe dem. Foſter* v. *Williams*.(b)

(a) M. 12. G. 3. B. R.
(b) Cowp. 621.

In the former the leſſor claimed as deviſee, in remainder, under a will 27 years ago, under which there was no poſſeſſion, and therefore ſeizin in the deviſor was neceſſary to be proved. For this purpoſe a witneſs was called to ſpeak to the declarations of the tenant in poſſeſſion, at that time *that he held as tenant to the deviſor*.

A new

A new trial was moved for on the inadmissibility of this evidence; and it was objected that this was mere hearsay-evidence, and that the party making the declaration was not upon oath; but the court held the evidence properly admitted, and the rather so, as it did not appear that the defendant had any sort of right, and probably might have come in under the tenant who acknowledged the right of the devisor, as he was of the same name with the tenant; and such confession would certainly be binding on all who claimed under him who made it.

But a difficulty occurring to the court, whether they could grant a *venire de novo*, the question relative to what judgment ought to be given stands over till the next term.

In Michaelmas Term, 1787, the court delivered their opinion that a *venire de novo* ought to be granted.

B. N. P. 317. If the bill of exceptions be not tacked to the record, it seems necessary to set out the whole record in it, in the following

(*b.*) Form

(*b.*) FORM of a *Bill* of *Exceptions*, *stating the whole Record.*

" BE it remembered, that in the term of " the *Holy Trinity*, in the third year of " the reign of our Sovereign Lord *George* the " Third, now King of *Great Britain*, and so " forth, came *William Huckle*, by *James* " *Philips* his attorney, into the court of our " said Lord the King, of the Bench at *West-* " *minster*, and impleaded *John Money*, *James* *Watson*, and *Robert Blackmore*, in a certain " plea of trespass, on which the said *William* " declared against them, That" (set out the declaration and other pleadings,) " And there- " upon the issue was joined between the said " *William* and the said *John Money*, *James* " *Watson*, and *Robert Blackmore*; and after- " wards, *to wit*, At the sittings of *Nisi Prius* " held at the *Guildhall* of the City of *London* " aforesaid, in and for the said City, before " the Right Honorable Sir *Charles Pratt*, " Knight, Chief Justice of our said Lord the " King, of the Bench at *Westminster*, *Thomas* " *Lloyd*, Esq. being associated to the said " Chief Justice, according to the form of " the Statute in such case made and provided; " on *Wednesday* the sixth day of *July*, in the " third year of the reign of our said Lord the " present King, the aforesaid issue so joined " between the said parties as aforesaid, came " to be tried by a jury of the City of *London* " aforesaid, for that purpose duly impanelled, " that is to say, *A. B. C. D.* &c. good and " lawful men of the said City of *London*; at

Huckle v. Money and others.

Vide the Case, Essay II. VI.

" which

" which day came there as well the said *William Huckle*, as also the said *John Money*, " *James Watson*, and *Robert Blackmore*, by " their respective attornies aforesaid. And " the jurors of the jury aforesaid impannelled " to try the said issue being called, also came, " and were then and there in due manner " chosen and sworn to try the same issue; and " upon the trial of that issue, the council " learned in the law for the said *William* " *Huckle*, to maintain and prove the said issue, " on his part gave in evidence, That" (so set out the evidence on the part of the plaintiff, and then set out the evidence on the part of the defendants, and then proceed as follows) " Whereupon the said council for the " said defendants, did then and there insist " before the Chief Justice aforesaid, on the " behalf of the defendants above-named, that " the said several matters so produced and " given in evidence on the part of the said " defendants, as aforesaid, were sufficient, and " ought to be admitted and allowed as decisive evidence, to entitle the said defendants " to the benefit of the statute made in the " twenty-fourth year of the reign of his late " Majesty King *George* the Second, intituled, " An act for rendering justices of the peace " more safe in the execution of their office, " and for indemnifying constables and others, " acting in obedience to their warrants; and " that therefore the said *William Huckle* ought " to be barred of his aforesaid action: and the " said defendants acquitted thereof, and thereupon the said defendants, by their council " aforesaid, did then and there pray of the " said justice, to admit and allow the said " matters and proof, so produced and given

" in

" in evidence for the ſaid defendants, to be
" concluſive evidence to intitle the ſaid de-
" fendants to the benefit of the ſtatute afore-
" ſaid, and to bar the ſaid *William* of his
" action aforeſaid. But to this, the council
" learned in the law, on behalf of the ſaid
" *William Huckle*, did then and there inſiſt
" before the Chief Juſtice aforeſaid, that the
" matters and evidence aforeſaid, ſo produced
" and proved on the part of the ſaid defen-
" dants as aforeſaid, were not ſufficient, nor
" ought to be admitted or allowed, to intitle
" the ſaid defendants to the benefit of the
" ſtatute aforeſaid; or to bar the ſaid *William*
" *Huckle* of his aforeſaid action, and that nei-
" ther the ſaid defendants, nor any of them,
" nor the ſaid Earl of *Hallifax*, were or was
" within the words or meaning of the ſtatute
" made in the ſeventh year of the reign of
" his late Majeſty King *James* the firſt, inti-
" tuled, An act for eaſe in pleading againſt
" troubleſome and contentious ſuits, proſe-
cuted againſt juſtices of peace, mayors,
" conſtables, and certain other his Majeſty's
" officers, for the lawful execution of their
" office: nor of the ſtatute made in the 21ſt
" year of the reign of the ſame late King,
" intituled, An act to enlarge and make per-
" petual the act made for eaſe in pleading
" againſt troubleſome and contentious ſuits
" proſecuted againſt juſtices of the peace,
" mayors, conſtables, and certain other his
" Majeſty's officers, for the lawful execution
" of their office, made in the ſeventh year
" of his Majeſty's moſt happy reign: nor of
" the ſaid ſtatute made in the twenty-fourth
" year of the reign of his late Majeſty King
" *George* the Second; nor in any way in-

" titled to the benefit of any of these statutes :
" and the council for the said *William Huckle*
" further insisted, that the seizure and impri-
" sonment of the said *William Huckle*, were
" not made or done in obedience to the said
" warrant, nor have the said defendants, or any
" of them in that behalf, any authority there-
" by. And the said Chief Justice did then
" and there declare and deliver his opinion
" to the jury aforesaid; That the said several
" matters so produced and proved on the
" part of the defendants were not, upon the
" whole case, sufficient to bar the said *William*
" *Huckle* of his aforesaid action against them,
" and with that direction left the same to
" the said jury; and the jury aforesaid then
" and there gave their verdict for the said
" *William Huckle*, and 300l. damages; where-
" upon the said council for the said defen-
" dants, did then and there, on the behalf of
" the said defendants, except to the afore-
" said opinion of the said Chief Justice, and
" insisted on the said several matters and
" proofs, as an absolute bar to the aforesaid
" action, by virtue of the last mentioned
" statute: and in as much as the said several
" matters so produced and given in evi-
" dence, on the part of the said defendants,
" and by their council aforesaid objected and
" insisted on, as a bar to the action afore-
" said, do not appear by the record of the
" verdict aforesaid, the said council for the
" aforesaid defendants, did then and there
" propose their aforesaid exception, to the
" opinion of the said Chief Justice, and re-
" quested the said Chief Justice to put his
" seal to this bill of exception, containing the
" said several matters so produced and given

" in evidence on the part of the said de-
" fendants as aforesaid, according to the form
" of the statute in such case made and provided; and thereupon the aforesaid Chief
" Justice, at the request of the said counsel
" for the above-named defendants, did put
" his seal to this bill of exception, pursuant
" to the aforesaid statute in such case made
" and provided, on the sixth day of *July*
" aforesaid, in the third year of the reign of
" his said present Majesty."

(*c.*) *Observations.*

The above precedent is taken from a bill of exceptions, which was made use of within these few years past: but it does not seem necessary to state the whole record in the bill, provided the bill be tacked to the record; which the statute plainly shews may be done, by saying, *if the exceptions be not in the roll*: and there are precedents to warrant this mode of proceeding. B. N. P. 319.

(*d.*) *General Form.*

The bill of exceptions would then begin as follows: " Which said issue in form aforesaid
" joined between the parties aforesaid after-
" terwards, *to wit*, at the sittings, &c." (and then pursue the former precedent.)

END OF THE FIRST VOLUME.